Supreme Court of the United States

October Term, 1922.

No. 646.

THE AKRON, CANTON AND YOUNGSTOWN RAILWAY COMPANY, *et al.*,

Appellants,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, and BOSTON AND MAINE RAILROAD, *et al.*,

Appellees.

Appeal from the District Court of the United States for the Southern District of New York.

BRIEF FOR APPELLANTS.

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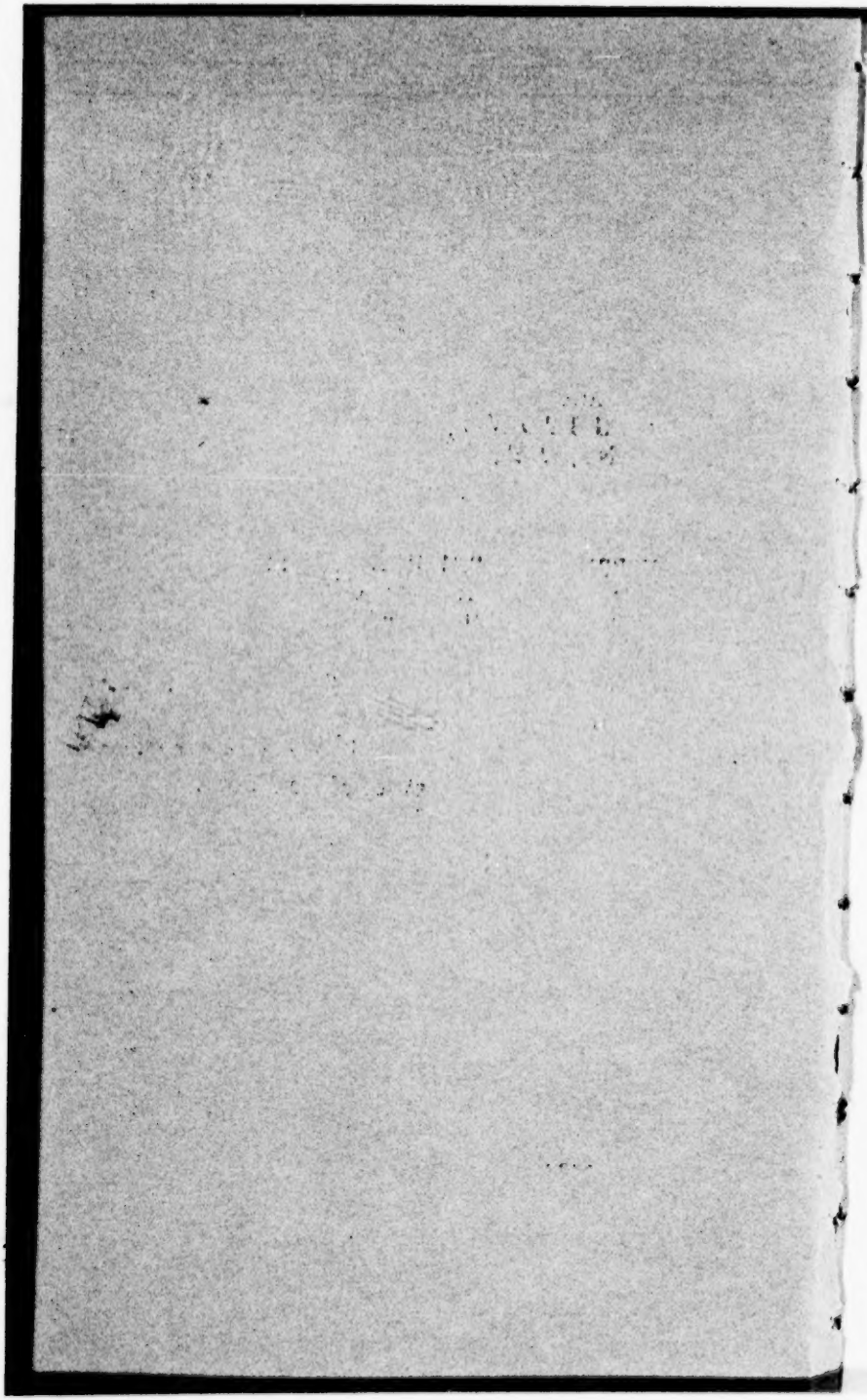

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I.

STATEMENT OF THE CASE.

This is a direct appeal from a decree of the District Court of the United States for the Southern District of New York refusing to grant an interlocutory injunction in a suit brought to

enjoin, suspend and set aside an order of the Interstate Commerce Commission (called in this brief the Commission), instituted in accordance with the provisions of the Urgent Deficiency Act of October 22, 1913 (38 Stat. L. 220).

The order in question was made in a proceeding instituted by the Bangor and Aroostook Railroad Company, Boston and Maine Railroad, Bridgton and Saco River Railroad Company, Central Vermont Railway Company, Central New England Railroad Company, Maine Central Railroad Company, Montpelier and Wells River Railroad, The New York, New Haven and Hartford Railroad Company, Rutland Railroad Company, Sandy River and Rangeley Lake Railroad and St. Johnsbury and Lake Champlain Railroad Company, railroad companies operating principally in the New England states, against substantially all the railroad companies operating elsewhere in the United States, although the Boston and Albany whose road runs through New England was also included. The proceeding related to the division of joint freight rates and was called "*The New England Divisions Case.*"

The complaint in the proceeding stated the importance of the railroads of the complainants, the aggregate value of their properties used in the service of transportation, the aggregate revenues received and the balance required to make a return of six per cent upon the aggregate property investment accounts.

The complaint then stated that by reason of

the inclusion, in the then recent rate case, of the complainants in the Eastern Rate Group with the defendants and the consequent inclusion of the property investment accounts and revenue requirements of the former with those of the defendants the latter would receive annually approximately $25,000,000 in revenue in excess of what they would receive if such accounts had not been included.

The complaint then alleged, in effect, that the complainants were parties with the defendants to a large number of joint freight rates which were "divided as between the complainants or some one or more of them and the defendants or some one or more of them, parties thereto;" that owing to certain geographical, industrial and economic conditions the operating costs of the complainants were higher than those of the defendants and were not properly reflected in the division of said joint rates and that the existing divisions with the defendants had become unjust and unreasonable.

The complaint concluded with a prayer for an order prescribing divisions of joint rates and for a further order "determining a just and proper allocation between the complainants of such increased revenue as may be awarded to them."

The original complaint failed to point out any divisions claimed to be unreasonable and the Commission of its own motion held it to be too general. More specific statements were required (Rec. p. 28), and thereupon the amended complaint (Rec. p. 19) was filed which was the same as the original with the exception that a paragraph was inserted referring to a schedule in

which were shown fifth class rates and revenue accruing therefrom on certain traffic.

The proceeding was heard at length before the Commission and was submitted upon the evidence contained in the present record upon April 23, 1921. On July 6, 1921, the Commission made its report, denying the relief prayed for. This report was written by Chairman CLARK, and it considered the questions presented exhaustively, reaching the conclusion that "*the record affords no foundation upon which might rest a valid prescription by us of divisions.*"

Subsequently, the Commission, without taking any additional testimony, ordered a re-argument which was heard on November 20, 1921, and on January 30, 1922, it made a new report completely reversing its previous decision. Commissioner POTTER concurred and Commissioners HALL, DANIELS and ESCH, dissented. Commissioner CLARK had resigned before the re-argument The order sought to be set aside in this proceeding is based upon this second report of the Commission and in its amended form, dated March 28, 1922, so far as material, reads as follows:

> "It is ordered, That of the joint class rates and of the joint commodity rates which are divided on the same bases as are applied to said joint class rates, for the transportation of property wholly within the confines of the United States in interstate or foreign commerce between points on defendants' lines, other than the lines of the Boston & Albany Railroad Company of which the New York Central Railroad Company is lessee, hereinafter referred to as the Boston &

Albany Railroad, and points on complainants' lines, other than the lines of complainant the Bangor & Aroostook Railroad Company, complainants shall receive, on and after April 1, 1922, as their just, reasonable and equitable divisions of said joint rates, divisions which shall be not less than 115 per cent of their present divisions, except in cases where their present divisions or their present divisions plus those of the Boston & Albany Railroad where it participates in the traffic as an intermediate carrier, are greater than the divisions now accruing to defendants, other than the Boston & Albany Railroad, in which cases complainants shall receive, as their just, reasonable and equitable divisions of said joint rates, divisions which shall be not less than:

(1) Where the Boston & Albany Railroad does not so participate in the traffic, their present divisions plus 15 per cent of the present divisions accruing to such defendants.

(2) Where the Boston & Albany Railroad does so participate in the traffic, their present divisions plus that proportion of such 15 per cent as their present divisions may be of the total of their present divisions and the division of the Boston & Albany Railroad.

It is further ordered, That the several carriers, other than the complainants and the Boston & Albany Railroad, participating therein shall receive as their just, reasonable and equitable divisions of said joint rates on and after April 1, 1922, the amounts remaining of said joint rates after deducting the divisions so to be received by complainants and the present divisions of the Boston & Albany Railroad where it participates in the

traffic, such amounts so remaining to be divided among such other carriers in the same ratio as their present divisions respectively bear to each other, or otherwise as they may agree, or failing such agreement, as may be determined by the Commission upon application therefor."

In the present suit the petitioners sought to enjoin the enforcement of said amended order, contending in substance that it was arbitrary, unlawful and in a form not authorized by law; that in making it the Commission had misinterpreted and misapplied the statute relating to the division of rates and that if the interpretation placed upon such statute by the Commission were correct it was unconstitutional. The petition in the suit contained a prayer for an interlocutory injunction suspending the enforcement of the order and the application for such injunction was heard by Circuit Judges HOUGH, MANTON, and MAYER sitting in the District Court for the Southern District of New York, in pursuance of the Act of October 22, 1913, (38 Stat. L. 220). The District Court denied the application for an interlocutory injunction and this appeal is from its decree in the premises.

II.

Specification of Errors.

The decree of the District Court appealed from is erroneous in that said Court failed to hold and rule that:

(1) The order in question is arbitrary

and unlawful because it applies the divisions statute as between groups of carriers and denies to individual carriers their rights under it.

(2) The order is arbitrary and unlawful because it directs a transfer of revenues pending a decision in the matter of divisions; a type of order for which there is no authority.

(3) The order is arbitrary and unlawful because it fails to prescribe the divisions "to be received by the several carriers," as required by the statute.

(4) The Commission mistook the law in holding that it had power in the public interest to make a divisions order to relieve the needs of carriers and in making the order as an exercise of such power.

(5) If the divisions statute were correctly construed by the Commission, it is unconstitutional.

(6) The order is not supported by an adequate record and is, consequently, invalid.

III.

Divisions Before the Enactment of the Interstate Commerce Act Upon the Subject.

Where several connecting railroads participate in a transportation service they form what is called a through route. The compensation which they receive for that service is called a joint rate. The shares of the joint rates apportioned to the several railroads are the divisions.

The Interstate Commerce Act as originally en-

acted gave the Commission no authority over the subject of the division of joint rates. The whole matter was left to the mutual agreement of the carriers participating in the joint transportation service. In 1906, however, amendments to the Act were passed giving the Commission a measure of authority over divisions. As so amended the Act read as follows (34 Stat. L. 584):

> "Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares or charges, shall fail to agree among themselves upon the apportionment or division thereof, the Commission may after hearing, make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order."

Doubt was expressed, upon the enactment of this Act, whether the Commission was given authority over the division of any other joint rates than those which had been established by its order. This question gave rise to differences of opinion in the Commission. At first the Commission seems to have felt that it had full authority. Subsequently it appears to have doubted whether such was the case. And in 1916, in the *Morgantown and Kingwood Divisions case*, 40 I. C. C. Rep. 509, it held distinctly that it had no authority except where divisions were involved which it had ordered. In 1918, however, it reversed its previous decision and held in the same case, by a majority vote (49 I. C. C. Rep. 540), that it had jurisdiction over all divisions.

IV.

The Present Statutory Provisions Concerning Divisions.

The obligation now imposed upon common carriers by the Interstate Commerce Act in respect of divisions is contained in the first section of the Act, paragraph 4 (41 Stat. L. 474).

> "It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property * * * in case of joint rates, fares or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers."

This statute makes it the duty of carriers to establish "just, reasonable and equitable divisions" as between those which participate in a joint service. In case they fail to fulfill this obligation, the Commission is empowered by the provisions of Section 15 of the Act, paragraph sixth (41 Stat. L. 484), to grant relief. These provisions read as follows:

> "Whenever, after full hearing upon complaint or upon its own initiative the Commission is of opinion that the divisions of joint rates, fares or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established) the Commission

> cation Territory were included in one rate group; as a result of the inclusion of Complainants' property investment accounts and revenue requirements in the same rate group with said Defendants, the amount of additional revenue necessary for the carriers in the group as a whole was increased to such an extent that the Defendants in said group will receive annually approximately $25,000,000 in revenue in excess of what they would have received if the Complainants had not been included in said group."

This contention of the complainants runs through their whole case—pleadings and testimony. The original demand was based upon the theory that the other roads in the Eastern Rate Group had greatly benefited by the inclusion of the complainants with them in such Group. The claim was worked out with particularity. It was calculated that the rate increase granted by the Commission to the Eastern Rate Group in the rate case known as *Ex Parte* 74 was 1.48 per cent more by the reason of the inclusion of the complainants' accounts in the aggregate figures than it would have been had the complainants been in a separate group. And applying this percentage to the 1919 volume of traffic it was figured that the other roads benefited to the extent of $25,000,000 a year by the inclusion of the complainants. What was sought to be accomplished by the proceeding was some arrangement which would serve to divert this $25,000,000 of annual revenue from the other carriers to the New England railroads.

This is manifest from the letter of Mr. PEARSON, president of the New Haven Railroad, to the

president of the other Eastern roads, written even before the decision in the rate case, in which he said (Exhibit 204):

> "The object of this presentation is to secure from the Trunk Line and interested Canadian carriers an understanding relative to the basis and method of distribution of the increase which the carriers in Official Classification Territory receive under the provisions of the Transportation Act.
>
> "Two alternative methods of accomplishing this result are:
>
> "*First:* That the amount contributed by the New England lines be recovered *through the medium of increased divisions* * * *.
>
> "*Second:* A proper distribution of the amount contributed by the New England lines by means of a pool under Sec. 407 of the Transportation Act * * *." (Italics ours).

Vice President CAMPBELL, of the New Haven road was most explicit in his explanation of the character and basis of the relief sought. He stated the amount which the complainants claimed as $24,500,000 and that $16,275,982 thereof was the portion of carriers in Trunk Line territory and the balance the portion of those in Central Freight Association territory. (Rec. p. 457). And he continued, with definiteness, as follows:

> "It is claimed by the New England roads that by reason of their inclusion in the eastern group the other carriers in that group have profited under the thirty per cent portion of the increase to the extent of substantially $24,500,000, and it is the transfer of at least this sum, based upon the volume of business upon which it is predicated, to the

New England roads that is now sought." (Rec. p. 457).

Mr. Hobbs, Vice President of the Maine Central, said:

> "Well, if the New England lines receive what we think belongs to us, namely, that 1.48 per cent, I have no doubt but what there will be a way found to put our part of it into our treasury * * *. If the whole $24,000,000 comes into New England, there are other ways of dividing it around equitably." (Rec. p. 351).

Mr. Eaton of the Boston and Maine in proposing a temporary plan of distribution stated that "his purpose was to give a quick method of apportioning that $25,000,000 that, under his theory, the other lines in the Eastern group had gotten by virtue of the inclusion of New England." (Rec. p. 403).

The testimony of other witnesses was to the same effect. Indeed most of the important witnesses for the complainants throughout the hearings referred to the claim of the New England roads as being one for $25,000,000 per annum based on their inclusion in the Eastern Rate Groups.

The Commission in its first opinion recognized the real nature of the complainant's case (Rec. p. 89):

> "We think that there is merit in the allegations of defendants that the proceeding is, in substance, an effort on the part of complainants to augment their revenues from traffic which they interchange with their con-

> nections without regard to the question of whether the present divisions of the various joint rates are fair and reasonable or consideration of the probable effects upon the revenues of the respective defendants. The proceeding is essentially an outgrowth of Ex Parte 74. It is contended for complainants that our decision in that proceeding operated to the relative disadvantage of the New England lines because their inclusion in the eastern group gave them less additional revenue and defendants more than might otherwise have been received and because of the difference in the percentage increases authorized for freight and passenger traffic, respectively, the lower percentage of increase having been authorized for passenger traffic, which is, generally speaking, relatively greater on complainants' lines than on the lines of defendants."

The foregoing statement of the Commission was not altered in its second decision. Indeed the concurring opinion of Commissioner POTTER emphasizes the real nature of the complainants' case. (Rec. p. 121).

There was no relation between the demand of the complainants based upon their inclusion in the Eastern Rate Group and the matter of divisions. The two subjects had nothing in common. If the complainants had a valid claim against the defendants in the first matter, it existed whether divisions were reasonable or unreasonable. The existing divisions might have been accepted by all parties as reasonable and yet the complainants' claim might have been just and valid. And if the

complainants' real claim had been wholly unjustified, divisions might have required revision.

Now, it would serve no purpose to discuss the merits of this claim of the complainants here. But although not going into its merits we desire it understood that we do not accept the contentions made. The New England roads were included in the Eastern rate group not only with their consent but upon their joint application with the other Eastern carriers, and if any inequalities resulted they were only such as always follow when corporations or individuals unite in a common enterprise for a common return. A rate increase based upon the aggregate account of carriers in a group must necessarily give some less and some more than they would receive upon their individual accounts. The sum suggested by the New England roads as measuring the alleged result is, moreover, nothing but an arithmetical fiction. There is no finding by the Commission which indicates that any sum actually accrued to the other roads by reason of the inclusion of the New England lines in the Eastern Group.

Mr. Campbell said (Rec. p. 456):

> "In developing the recent rate case, decided in *Ex Parte* 74, the New England territory by mutual consent was included in the balance of Official Classification territory as a single group for rate making purposes. The New England carriers, although realizing that their requirements would necessitate a relatively greater percentage increase of the freight revenues than in the rest of the Official Classification territory, were actuated

> in so including New England to avoid a higher rate level in that region than in the rest of the territory because of the injurious effect it was believed a higher level would have upon New England industry. * * *"

It is manifest that the framework of this whole proceeding grew out of the complainants' original demand. That was the reason, obviously, for the single proceeding instituted by practically all the New England carriers as complainants instead of proceedings by carriers participating in transportation services. That was the reason for the order by groups. That was the reason why a blanket horizontal order was asked for and made. The thought was not to secure a revision of any divisions found to be unreasonable but to obtain a diversion of revenues.

It is undoubtedly true that if the order in question be based upon adequate pleadings and testimony and affect proper parties and be in accordance with the divisions statute, it is none the less valid that the complainants may have had some demand of a different nature. The allegations and evidence concerning such demand might be regarded as surplusage. But, on the other hand, if the evidence be inadequate, or if the order be not in accordance with the statute, it is not to be helped out by any alleged equities having no relation to divisions. As we shall show, the order in this case is extraordinary in nature and in type. But it takes the form of ordering divisions and must stand or fall as a divisions order without regard to ulterior matters.

ARGUMENT.

FIRST POINT.

The order in question is arbitrary and invalid because it applies the divisions statute as between groups of carriers and denies to individual carriers their rights under it.

(1) *The essence of the divisions statute is that the situations of the different participating carriers be considered and those alone.*

The divisions statute provides with sedulous care for the consideration of the rights and equities of the several carriers participating in earning the joint rate to be divided. The Commission is directed to consider the "respective operating expenses" affecting "the several carriers." It is required to give consideration to whether "*any particular participating carrier* is an originating, intermediate or delivery line." And this is all to the end of prescribing divisions of joint rates "*to be received by the several carriers.*" Manifestly, these provisions are wholly inconsistent with an order which divides the railroads of the country into groups and deals with them, not severally, but *as groups.* In making such an order the provision for considering the respective operations of the several carriers cannot be adhered to, nor can weight be given to the fact that one participating carrier rather than another is an originating, intermediate or delivering line. A group decision, regardless of its form, would not prescribe divisions to be received by the several carriers.

The complainants before the Commission were

eleven railroad companies operating in the northern, central and southern sections of New England. The defendants operated roads all over the United States. Certain of the complainants and certain of the defendants operated through routes. These routes from different sections of New England to different parts of the country criss-crossed in every conceivable way and were largely unrelated. Notwithstanding these conditions and the express provisions of the statute, the Commission in making its second report treated all the complainants as constituting one group and all the defendants as constituting another group and inquired as to the financial needs of the complainants as a whole. The decision was based upon the theory of fixing divisions as between groups of carriers without considering them as participants in earning any joint rates. The horizontal change in divisions prescribed, in itself, demonstrates that no regard was paid to the varying conditions of the carriers within the one group or the other. The comparisons made by the Commission are all between groups and not between carriers. In all the discussion of the evidence in the second report (Rec. pp. 113-117), there is not a single reference to any railroad (with the exception of the Bangor and Aroostook, which was given no relief) but all the data and discussion relate to the two groups.

(2) *The rights of individual carriers were submerged under averages.*

The decision of the Commission is founded solely upon a comparison of group statistics. The statistics of a great number of carriers participating in different and unrelated routes

are merged and a result is obtained which shows general or average conditions, but does not reflect the situation as to any of the several carriers involved. An example may make this point clearer: The application of the order fixes the divisions to be received by the New Haven and the Lehigh Valley railroads out of joint rates participated in solely by those two carriers and applying between points on their two roads. In determining the basis of divisions as between the two railroads the Commission has not taken into account the respective operating expenses and other circumstances and conditions affecting the participation of those two roads in the joint service involved but has been guided exclusively by a comparison of the statistics of an arbitrarily constituted group of carriers west of the Hudson River, which includes the Lehigh Valley, with the corresponding statistics of an arbitrarily constituted group of New England carriers, which includes the New Haven. It is manifest, however, that while the statistics regarding the group of carriers west of the Hudson River, as compared with those of the New England group, might show one situation, the statistics of the Lehigh Valley, as compared with those of the New Haven road might show an entirely different situation. The fact is that the action of the Commission in fixing the divisions in this illustrative case was just as arbitrary as if the Commission had proceeded without any evidence whatever, since it is obvious that the evidence on which it acted had no real relevancy or materiality upon the question of just and reasonable divisions as between the Lehigh Valley and the New Haven.

Another illustration may further emphasize the point. By the operation of the order the Erie railroad, as a member of one group, is required to shrink its revenues in favor of the New Haven, as a member of another group. Yet, the due application of the divisions statute to the respective situations of the two roads themselves might require the New Haven to shrink its revenues in favor of the Erie. The group theory turns the divisions statute topsy-turvy.

The situation was fully recognized by the Commission in its first report. It pointed out that while a particular relation might exist as between the group of railroads east of the Hudson River, on the one hand, and the group west of the River, on the other hand, an entirely opposite relation might, at the same time, exist as between a particular member of one group and a particular member of another group. (Rec. p. 51).

A carrier in the one group or the other may be so situated as to be entitled to the favorable operation of many of the factors of the divisions statute and yet, under such a group decision, its rights are submerged under a flood of averages. *If such a decision be valid the result is that two connecting lines participating in the joint undertaking of earning a joint rate cannot have their shares of the joint proceeds set off on the basis of the statutory considerations affecting them but must accept shares determined by considerations affecting carriers having no connection with the undertaking.*

The only possible basis upon which a group decision could stand, either as a permanent

It also shows the traffic densities for certain defendant railroads to be as follows:

Ann Arbor, 1,168,275; Detroit and Mackinac, 217,617; Lehigh and New England, 2,339,297; New York, Ontario and Western, 1,305,628; New York, Susquehanna and Western, 1,249,128; Pere Marquette, 1,401,903; Pittsburg and Shawmut, 1,503,865; Pittsburgh and West Virginia, 295,077; Ulster and Delaware, 1,332,539; Cincinnati, Indianapolis and Western, 837,283; Cincinnati Northern, 914,371; Detroit, Toledo and Ironton, 3,867,487; Lake Erie and Western, 2,952,209; Buffalo and Susquehanna, 4,362,065; Grand Rapids and Indiana, 954,266; Long Island, 4,218,616; West Jersey and Seashore, 457,217.

With respect to length of haul, the same exhibit shows an average length of revenue freight haul for the New England lines of 100.64 miles, and for the Trunk Lines and Central Freight Association lines, together, 153.39 miles. The average length of haul for the Boston and Maine, however, is 119.98 miles; the average for the Central New England 70.44 miles, and for the New Haven 91.94 miles. The exhibit shows that the following defendant roads have shorter hauls, on the average, than the Boston and Maine, and many of them shorter hauls than either the Central New England or the New Haven: Detroit and Mackinac, 71.63; Detroit, Toledo and Short Line, 53.47; Lehigh and Hudson, 70.68; Lehigh and New England, 30.77; Monongahela, 21.48; New York, Susquehanna and Western, 26.03; Pittsburg and Shawmut, 49.26; Pittsburgh and West Virginia, 17.90; Ulster and Delaware, 73.12; Cincinnati, Indianapolis and Western, 100.97; Detroit, Toledo and Ironton, 111.68; Kanawha and Michigan,

107.49; Wheeling and Lake Erie, 103.90; Bessemer and Lake Erie, 112.13; Buffalo and Susquehanna, 104.29; Central New Jersey, 72.29; Cumberland Valley, 53.07; Grand Rapids and Indiana, 100.62; Long Island, 23.70; New York, Philadelphia and Norfolk, 112.36; Philadelphia and Reading, 104.23; West Jersey and Seashore, 30.70.

(3) *The form of the order in question does not affect its real character.*

After the Commission had dealt with the parties by groups and had reached its conclusions upon group statistics and evidence, it felt called upon to give effect to its decision. A sweeping order requiring the defendants to pay to the complainants $7,500,000—that being the amount which it figured out ought to be transferred from the one group to another—would have been manifestly beyond its power. So it ought to accomplish the desired result by making an order affecting carriers individually. It ordered, in substance, that the complainants should receive 115 per cent of their existing divisions and that their connections should divide what was left, according to the existing ratios. But this was wholly arbitrary action and added nothing to the situation. The group report was made a part of the order and the order must stand or fall with it.

(4) *The rate statute affords no support for a divisions order by groups.*

The first contention made in this matter in the District Court was that the Commission had dealt with railroads in rate matters by groups before there was a statute authorizing them to

do so and so could act in the same manner in division matters. With respect to this contention it seems sufficient to say that nothing in the practical application of a *rate* law could have justified the Commission in taking action directly contrary to the requirements of the *divisions* statute. A law requiring the Commission, in establishing divisions, to apply certain standards and to apportion joint rates among several participating carriers cannot be avoided by previous practices in other matters, whether or not they were justified in respect to such other matters.

The second contention, and the one most strongly pressed, was that the provisions incorporated in the Interstate Commerce Act by the Transportation Act (Sec. 15a), requiring the Commission to adjust rates for carriers in "rate groups" should be given, by analogy, some sort of application in a divisions case.

Section 15a—the rate provision—requires the Commission to consider the carriers of a "*group*" "*in the aggregate*" and to prescribe such rates as will yield the group, in the aggregate, a fair return. For this purpose the Commission must ascertain the aggregate value of the property of the carriers in the group, the aggregate operating expenses, and the aggregate taxes, and on the basis of these aggregates ascertain the schedule of rates which will yield a fair return. No individual carrier can be considered except to the extent that its property investment and its expenses constitute a part of the aggregate. Action by groups is required.

The present divisions provision in the Act—also incorporated in it by the Transportation Act

—is the direct antithesis of the rate-making provision. In considering divisions the Commission is required, as we have seen, to consider the different factors enumerated in the provision as they affect the right of the individual carrier to receive a greater or less share in the joint rate. Individual carriers must be considered and since no two individual carriers in any group can be in precisely, or even substantially, the same situation with respect to the various factors, it is plain that no general order prescribing the same relief to all carriers in a group could be in compliance with the statute. We place the two provisions in juxtaposition.

Section 15a, Par. 2:

> "In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: Provided, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country (41 Stat. L. 488).

Section 15, Par. 6:

> "Whenever, after full hearing upon complaint or upon its own initiative the Commission is of opinion that the divisions of joint rates, fares or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established) the Commission shall by order prescribe the just, reasonable and equitable divisions thereof to be received by the several carriers.
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> • • • • • • •
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> "In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to," [the factors already considered] (41 Stat. L. 484).

Congress deliberately dealt with the two subjects in opposite manner. In so far as rates were concerned, it was willing to have the Commission deal with groups of carriers because, undoubtedly, it felt that as between the public and the carriers rates might reasonably be determined from the standpoint of the interest of the carriers as a whole. Rates are related. The rate between two points is ordinarily the same over competing routes, but divisions are entirely different. They are determined primarily by the comparative services rendered. So when Congress came to the matter of divisions—the question how a sum of money earned by several carriers should be ap-

portioned among them—it provided with the utmost care for the recognition of individual rights and equities. The very fact that Congress, in one and the same Act, provided for dealing by groups in rate matters and carefully prescribed divisions among individual carriers in division matters, demonstrates that Congress intended that the two subjects should be dealt with in different ways. The presence of the group provisions in the rate section and their absence in the divisions section serve to emphasize the deliberate intention of Congress that divisions should be dealt with as between the participating carriers.

(5) *Other considerations.* The argument that the pressing necessities of the complainants required action by groups rather than by carriers is one which might appeal to Congress but which, of course, has no force before courts which construe and apply laws, and do not make new ones to meet emergencies. Moreover, it is not shown that any emergency required the bringing of the proceeding in group form. If the New England roads had brought separate divisions proceedings against their connections in accordance with well established procedure such proceedings could have been disposed of with reasonable dispatch. And that, on account of the existence of the alleged claim, which we have noticed, the usual procedure was not followed, was no reason for the action taken.

This is the only divisions case in which the Commission ever made an order between two groups. Every divisions case appearing in the reports of the Commission has been between car-

riers participating in certain routes. Carriers have instituted proceedings against their connections to obtain increased divisions. And when the Commission has initiated proceedings itself participating carriers have been the parties. Even in the *Missouri and North Arkansas Divisions Case* (68 I. C. C. Rep. 47) and in the *Orient Divisions Case* (73 I. C. C. Rep. 319), decided since the present case, where, as we shall show under another point, the Commission went very far indeed in applying the divisions statute, the parties considered were the participating carriers. The decision in this case runs in the face of precedent as well as of law.

Another argument, pressed in the District Court, was that as the Commission is an expert body, well qualified to deal with the subject, it must have a wide discretion to treat the matter of divisions in a broad and comprehensive manner if it deems such course desirable. All of which comes down to this—that the Commission may in its discretion disregard the law.

It is unnecessary to point out to this Court that the Commission is an administrative body having the powers, and only the powers, conferred upon it by Congress. It may act in respect of matters only as Congress directs. Its power regarding the division of joint rates is the power conferred by the divisions statute and it has no other power in respect thereto. The very breadth and scope of the Commission's powers over transportation matters make it the more imperative that it should be confined to them. This Court has no higher function than to hold the Commission to the exer-

cise of the vast and far-reaching powers conferred upon it by law and to the exercise of those powers alone.

SECOND POINT.

The order is arbitrary and invalid because it directs a transfer of revenues pending a decision in the matter of divisions; a type of order for which there is no authority.

The conclusion which the Commission reached in its original report was as follows (Rec. p. 93).

> "We are authorized to prescribe only just, reasonable, and equitable divisions 'to be received by the several carriers.' Full hearing and competent and relevant evidence are prerequisite. Any attempt to prescribe a blanket increase of divisions as here sought in the face of admissions and uncontradicted evidence that certain divisions are now just, reasonable, and equitable to complainants would override the plain mandate of law."

The first report then recommended the parties to appoint committees to take up the revision of divisions and to report to the Commission.

The Commission in its second report apparently accepted the conclusion of the first report as to a real divisions order but said that as the course suggested in the first report had failed to afford prompt relief "we must adopt another." And the Commission further said (Rec. p. 118).

> "Upon further consideration we are of the opinion that in a case involving divisions we

> may, when the public interest so requires, grant immediate relief subject to later readjustments, as we have done in cases involving general increases or reductions in rates. Otherwise, we shall fail to do substantial justice. The act requires a practical administration, and prompt action where that is necessary in the public interest * * *."

The action taken by the Commission is well summed up in the opinion of the District Court (Rec. p. 947):

> "The act makes it the Commission's duty to find a way, despite the complexity of the subject, to carry out the new mandate of Congress and makes it clear that the matter must be dealt with in a comprehensive way.
>
> Nor may just complaint be lodged against this order because it is temporary and provisional and represents a transfer of revenue pending the Commission's reaching a conclusion on the subject of divisions."

This language means nothing else than that the Act makes it the duty of the Commission to "*find a way*" to apply it, and that the Commission has authority to make a "*temporary and provisional order*" for a "*transfer of revenue*" pending "*a conclusion on the subject of divisions*". This puts the case in a nut shell. If the Commission has any such authority our present point fails. And conversely if the Commission has no such authority the order should fail.

It would seem that an administrative tribunal should find the way to apply a law in the provisions of that law. The only connection which the

Commission has with the subject of divisions is through the divisions statute. That prescribes with meticulous care what the Commission is to do and how it is to do it. (1) There must be a complaint or the Commission may act upon its own initiative. (2) A "full hearing" is required in every case. (3) The Commission must be of the "opinion" that existing divisions are or will be unjust or unreasonable. (4) If it is of such opinion "the Commission shall by order prescribe the just, reasonable and equitable divisions to be received by the several carriers." (5) In prescribing divisions the Commission must give "due consideration" to the different factors to which attention has been directed. The statute contains no authority for "temporary or provisional orders" or for orders for the "transfer of revenues". It does not empower the Commission to make an order affecting divisions pending a conclusion on the subject of divisions, for it is only after it has reached a conclusion upon that subject that it has power to make a divisions order at all.

The divisions statute affords no authority whatever for a general order transfering revenues subject to later re-adjustments. All that it authorizes is a determination of just and reasonable divisions after those existing have been found to be unjust or unreasonable. In the proper application of the statute there never can be a prescription of unreasonable divisions to be adjusted afterwards: that would be to be fly in the face of the statute. Moreover, even in rate cases—upon which the Commission relies for a precedent—an extraordinary general order cannot be justified

even by a provision in the statute permitting readjustments. In the *Wisconsin Rate Case*, 257 U. S., 563, this Court said:

> "Nothing in the precedents cited justifies an order affecting all rates of a general description when it is clear that this would include many rates not within the proper class or the reason of the order. In such a case the saving clause by which exceptions are permitted can not give the order validity."

The Commission said in its first opinion that the existing divisions were "a mess of inconsistencies." In its second opinion it said that any horizontal increase might leave "certain divisions too high and others too low." Accepting it then, that some divisions were unfavorable to the New England roads, that some were favorable to them, and that others were just and reasonable, it is manifest that a horizontal increase of fifteen per cent upon all divisions would not produce just and reasonable divisions. Those which were favorable to the New England roads would be made the more favorable; the increase would accentuate the existing unreasonableness. Those which were just and reasonable would be made unjust and unreasonable. Only such divisions as happened to be depressed to the extent of fifteen per cent would be made reasonable by the order.

The situation is well illustrated the dissenting opinion of Commissioner DANIELS (Rec. p. 126):

> "The evidence of record contains not a few, but numerous instances where the present divisional bases seem grossly unfair to the complainants' connections. For example, from

Holyoke, Mass., said to be the largest paper producing point in New England, for a haul of 10 miles to the connecting carrier, the Boston & Albany, a subsidiary of the New York Central, the complainant receives on traffic to points west of Buffalo, N. Y., a division based upon a constructive mileage of 321 miles. This division will be increased under the present decision. Apparently, so far as the New York Central and the New Haven are concerned, there are but two divisional blocks for the bulk of tonnage interchanged. For hauls averaging slightly over 40 miles, the New Haven draws divisions based on constructive mileage of 255 and 321 miles respectively. These divisions under our order are to be increased. The divisions between the Boston and Maine and the New York Central via Troy are instanced in the record. Here it cannot be reasonably suggested that the terminal expenses in New York City are not as great as at Keene, N. H., Fitchburg, Mass., or Concord, Mass. Taking Keene for the first example: The distance to Troy is 122 miles, thence via the New York Central to New York City the distance is 146 miles. The present first-class rate is 74 cents, of which the Boston & Maine now draws 45.8 cents, the New York Central 28.2 cents. The order in this report will increase the former's division to 50 cents, leaving the New York Central 24 cents. The sixth-class rate between Keene and New York City is 24 cents. It divides at present between two carriers, 14.5 cents to the Boston & Maine, 9.5 cents to the New York Central. The order in this case augments the Boston & Maine division to 16 cents, leaving 8 cents to the New York Central."

Having shown that the divisions statute does not authorize any provisional orders subject to readjustment or justify a "practical administration" contrary to its provisions, it is hardly necessary to go further with the discussion upon this point. Still, as the Commission said, that it made the order as "we have done in cases involving general increases or reductions in rates," it may be desirable to compare further the rate statute with the divisions statute which are printed in the preceding point of this brief.

The rate making section (Sec. 15a) on its face contemplates that unjust or unreasonable rates may be produced by its exercise, since it contains the proviso that "the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust, or unreasonable." There is no such proviso in the divisions statute which contemplates that the exercise of the power to revise divisions shall produce just and reasonable divisions and not unreasonable divisions subject to readjustment. To say that an unreasonable division may be established by the Commission involves a contradiction in terms. As we pointed out in considering the "group" question the very fact that in the same Act, Congress prescribed different courses of procedure in rate cases than it prescribed in divisions cases, demonstrates that it intended them to be dealt with differently.

For a further comparison of the rate making power of the Commission, with its power over divisions, the attention of the Court is particu-

larly called to the dissenting opinion of Commissioner DANIELS in this case (Rec. p. 123).

Turning to another phase of this matter we meet the proposition that the order in question was properly made as a sort of supplementary or auxiliary order to that in the rate case (*Ex Parte* 74). Thus, the District Court said (Rec. p. 947):

> "The record shows that for three years preceding the order there had been a heavy and far reaching increase in railroad operating expenses throughout the country. On account of this increase, the Commission in *Ex Parte* 74, made an increase in rates throughout the Eastern District, amounting in actual practice to about 37%. It was found that in this proceeding that this heavy increase in the operating cost had been proportionately greater in New England than in the rest of the Eastern District, *and for this proportionate increase the order in question is made.*" (Italics ours).

The statement of the District Court is based upon a similar statement in the report of the Commission. But the conclusion does not follow from the premises. The rate increase had nothing to do with divisions. If the conditions of the New England carriers were dissimilar to those of the roads west of the Hudson River, so that they failed to receive a just return from a general rate order, the remedy might have been to put them into a group by themselves. The rate law, however, does not contemplate that all the carriers in a group shall receive equal benefits from a rate increase. Section 15a (5) of the Interstate Commerce Act

says that as it is impossible that they should receive equal earnings, the receipts of any carrier in excess of a fair return shall be held by the carrier as trustee; section 15a (6) provides that one-half of such excess shall be held by the carrier in a reserve fund and the other half paid to the Commission, and section 15a (10) provides that the amount received by the Commission shall be administered as a revolving fund, from which loans may be made to carriers, or which may be used for certain specified purposes. *The rate law is complete in itself and so is the divisions law.*

The basis of any divisions proceeding would have been precisely the same before the decision in the rate case as afterwards. If there were no grounds for a change in divisions, the complainants in such a proceeding would not have been entitled to relief. If there were valid grounds for a change in divisions they would have been entitled to them irrespective of any rate increase.

To illustrate: Let us assume that a through route exists from A to B, participated in by four carriers and that the joint rate is $4 divided in equal proportions. Suppose relative conditions remain the same and that the rate is increased to $8. Obviously the divisions would remain the same. And if a change in relative conditions should come about, it would call for a change in divisions whether the rate were changed or not. In and of itself an increase in a joint rate favors no participant; it is all a matter of a proportion. Divisions do not fluctuate with the rise and fall of rate levels.

It is idle, however, to consider any alleged changes in conditions in this case. The Commis-

sion in its second report never attempted to prescribe divisions according to the statutory standard. It made an order for transfer of revenues to aid the complainants. It figured out that $7,500,000 a year would have accrued to the complainants if it had been possible to make a different distribution of the revenues produced by the rate increase and then ordered a fifteen per cent increase in divisions to produce that amount.

The danger in allowing such an order to stand can hardly be over estimated. The rights of these defendants with respect to divisions have not been passed upon, and yet their revenues have been taken away from them. The case has been decided in advance of a hearing. Attempts at readjustment would be impracticable and would merely involve delay.

The result is that for nearly a year there has been in force upon the railroad of this country a new scale of divisions of joint rates which has never been agreed upon by the parties nor established by the Commission with any regard whatever to the elements which the law commands shall be considered in making them. If the Commission has authority to make such an order as this, it may deplete railroad revenues at will and reduce all roads to a common level.

THIRD POINT.

The order is arbitrary and unlawful because it fails to prescribe the divisions "to be received by the several carriers" as required by the statute.

This point is complementary to the preceding points. If it could be assumed that the proceed-

ings had been instituted by one of the New England carriers against its connections instead of by the group, and that the Commission had undertaken to apply the divisions statute according to its requirements, the question would still arise whether it could make a divisions order without making a complete one; in other words, whether it could consider the statutory elements as they applied to the complainant, without considering them as they applied to each of the defendants and without making divisions as among all the different carriers.

Whatever may be said about the other questions in the case, it cannot be questioned that in making this order the Commission did not prescribe divisions among the several carriers entitled to share in the joint rate. So far as it considered the statutory elements at all, it considered them as affecting the complainants alone. Of course the order provides that the defendants shall divide what remains of a joint rate after taking out the fifteen per cent, according to existing percentages, but that is as far as possible from determining that such percentages conform to the divisions statute. The problem with respect to the defendants could not be solved by a mathematical formula of general application.

Now every division of joint rates necessarily involves the apportionment of the rate among all the participating carriers. The carriers establish a through route for which they make a joint rate covering the whole service. The problem of how to apportion this rate is what the divisions statute deals with and in dealing with it the Commission, as we have seen, is required to consider the different factors enumerated in the statute "*as they may entitle one carrier to a greater or less pro-*

portion than another carrier of the joint rate fare or charge." The statute also provides that the Commission *shall* prescribe the divisions "*to be received by the several carriers.*"

No action can be taken until there is a finding that, as among the parties to the rates, action is required. And when action is taken it is difficult to see how the mandatory provisions of the statute can be avoided unless the parties consent. The case in principle is like a suit for the partition of real estate in which the decree necessarily sets out the shares of the different co-tenants; its very object is to determine all rights. Even a court of equity could hardly make a partial partition unless the parties agreed. And the Commission could not make one, except by consent, without disobeying the statute.

In making this contention, we are not making one which would render the divisions statute unworkable. The Commission in concluding its opinion said (Rec. p. 120):

> "We enjoin upon complainants and defendants the necessity for proceeding as expeditiously as possible with the revision of divisions upon a logical and systematic basis which we recommended in our former report; and in order that delay in this process may be reduced to a minimum, we make the following additional recommendation."

Then the Commission made recommendations for the parties to follow which indicated how the different complainants might have conducted proceedings for the revision of divisions with their connections in a comprehensive way and with reasonable dispatch, and how the Commission itself might have dealt with the matter.

Considerable is said in the opinion of the District Court about "primary divisions" at the Hudson River. Nothing was said about them in the opinion of the Commission. This was very natural because the Commission was not making any primary divisions, secondary divisions or any real divisions at all. As the District Court itself said, the Commission made an order for the transfer of revenues pending the determination of the divisions matter. Primary divisions have nothing to do with transfers of revenues.

Still the existence of a practice among carriers to make primary divisions is put forward as an excuse for the failure of the Commission to prescribe the divisions to be received "by the several carriers" as expressly required by the statute.

Undoubtedly there are cases where the connections of a complainant would be willing to absorb an increase in existing proportions without further order. If the complainant were a carrier east of the Hudson River and the carriers themselves had been accustomed to make primary divisions at the Hudson River such a course might naturally be taken. Whether any such course would be taken if there were several carriers east of the River and several carriers west is all a matter of convenience. There is, however, no evidence in the record that primary divisions at the Hudson River were ever made as to any of the through routes affected. The first suggestion of primary divisions appeared in the Commission's answer in the District Court, which of course is not evidence. But if such practice did exist the matter would still come down to a question of consent, tacit or express.

FOURTH POINT.

The Commission mistook the law in holding that it had broad power in the public interest to make a divisions order to relieve the needs of carriers and in making the order as an exercise of such power.

(1) *The authority claimed by the Commission.*

At the beginning of its second report the Commission said in speaking of its first report (Rec. p. 110):

> "We found that the record afforded no foundation upon which might rest a valid prescription by us of divisions but that we could not disregard the conditions portrayed. Existing divisional arrangements were the antithesis of equality."

The Commission then further quoted from its first report (Rec. p. 111):

> "We are bound under the statute to determine whether divisions properly in issue, justly, reasonably, and equitably compensate each carrier, relatively and *per se*, for the service it performs in the joint haul under joint rates, fares and charges * * *."

Following this statement of its duty, the Commission in its first report held that there was not sufficient evidence in the record to justify it in attempting to prescribe divisions. *No additional evidence was introduced on the re-argument.* The Commission, however, without questioning the accuracy of the above definition of its duty, went on to assert far greater authority.

~~Thus the Commission said, regarding the~~ This the Commission said regarding the Transportation Act (Rec. p. 112):

> "Paragraph (6), section 15, of the interstate commerce act was a part of the transportation act, 1920. Both the legislative history and the provisions of that act make it clear that the purpose of Congress in this legislation was broader than the mere regulation of individual railroads. Congress was endeavoring to assure an effective transportation for the nation. The principle was recognized that the various carriers, while independently owned, are nevertheless to a large extent interdependent, and *that they owe a duty to one another in the public interest.*"

The Commission further said (Rec. p. 113):

> "It is impossible to avoid the conclusion that Congress *intended the relative financial needs of carriers*, so far as these needs are legitimate and incident to the transportation service to be given consideration in fixing divisions; and it is just and right that this should be so."

The Commission also said, in speaking of the different situations of different railroads (Rec. p. 113):

> "Yet all are parts of the national transportation system and must be adequately maintained if they are not to be abandoned. *Due regard for the public interest demands that we give these fortuitous inequalities consideration in the fixing of divisions.*"

The Commission also said (Rec. p. 113):

> "* * * that *included in such cost is a due proportion of the burden of maintaining the financial integrity and credit of the carrier.*"

How members of the Commission understood the measure of authority claimed is shown by the dissenting opinion of Commissioner HALL (Rec p. 122):

> "But the present majority, in clearing a path to the present conclusions and order, has developed a construction of the law, and of our functions under the law, which, if tenable, would stamp it as no law because beyond the power of Congress. Whether or not the Congress can curb the strong and foster the weak under the guise of protecting the public interest, certainly it can not confer such power upon its agency. It can and does determine the regulations to which all common carriers by railroad engaged in interstate or foreign commerce, whether strong or weak, must conform in the public interest. It has prescribed certain standards for that regulation and has committed to this Commission, as its agency, the application of those standards to the facts which may be developed of record upon complaint or in the course of inquiry. In thus administering and enforcing the interstate commerce act we can change what the carriers do or have done only as we find violation of that act, and in doing so must mete out an evenhanded justice to all parties before us, whatever their weakness or strength. *It has not been committed to us to equalize the fortunes of carriers, of localities, or of men.*"

But the most convincing evidence of the authority which the Commission claimed was the authority which it exercised. It made the extraordinary order which we have discussed and said that it did so to "afford immediate relief" to the complainants. It cannot be too much to say, in view of what the Commission said and did, that it asserted authority to make such an order to relieve the needs of carriers and to consider their "*financial ability and credit;*" all for the purpose of maintaining a national transportation system. It is perfectly clear that, as the Commission viewed it, the case before it was as far away as possible from a divisions case involving the determination of divisions upon typical evidence.

The view of the Commission as to its authority is also made clear by its decision in the *Missouri and North Arkansas Divisions Case* (68 I. C. C. Rep. 47), decided a few weeks after its decision in the present case.

In that case it appeared that the Missouri and North Arkansas road was not only in the hands of a receiver but that its operation had been suspended for more than six months prior to the order. The Commission referred to its decision in this case as an authority for granting relief; laid stress upon the fact that the road required additional revenue in order to resume and continue operations and said: "It is necessary that all essential facilities of the country be kept in operation."

In the *Kansas City, Mexico and Orient Divisions Case* (73 I. C. C. Rep. 319) decided August 9, 1922, the Commission in a proceeding initiated

by itself granted increased divisions to an unfinished road in receivership. It appears from the decision that various measures for increasing the revenues of the Orient road had been tried. Wages had been reduced. An increase of rates was regarded as impracticable because tonnage would be curtailed. The road was found to be of importance to the public and so relief in the form of increased divisions was awarded.

The Commission in its second report sought to support its claim of authority by referring to changes made in the divisions law by the Transportation Act. It also said that the legislative history of the Act makes "it clear that the purpose of Congress in this legislation was broader than the mere regulation of individual railroads." We are, therefore, called upon to consider whether there is anything revolutionary or startling in the changes made in the divisions law and to examine the history of such changes.

(2) *The factors considered by the Commission in making divisions under the old statute.*

The District Court was quite in error in thinking (Rec. p. 947) that the changes in the divisions law indicate "that mileage alone was not to be considered." Mileage alone had never been considered. A careful examination of all the division decisions rendered by the Commission will establish *that before the adoption of the Transportation Act it had considered in division cases every factor affecting divisions enumerated in that Act.*

With respect to the public interest in divisions

Commissioner EASTMAN said in his concurring opinion in the case of *Western Pacific R. R. Co.* vs. *Southern Pacific Co.*, 55 I. C. C. Rep. 71, 84, decided in 1919:

> "If one carrier succeeds in withholding from another its fair share of joint rates or fares, it needs no argument to prove that the latter will be harmed, and that the public in the end will suffer also. It follows that fair dealing in the relations of carriers with each other is as much a matter of public concern as fair dealing in their direct relations to passengers and shippers, and this, I think, is recognized by the law."

In *Manufacturers Ry. Co.* vs. *St. Louis, etc. R. Co.*, 21 I. C. C. Rep. 304, 313, the Commission said:

> "The purpose of the Act in this respect [divisions] must be fulfilled by action appropriate to the end in view and at the same time effective to prevent unjust discrimination in any form, enforcing reasonable requirements and limitations in respect to the establishment of through routes and joint rates and the sharing of the earnings thereunder consistently with all other provisions of the statute in such manner as will result in substantial justice to all the parties in interest *and the observance of the standards of the law in the public interest.*" (Italics ours.)

Another factor which the Commission considered in the divisions cases under the old Act was the amount required to pay the operating expenses of the various carriers and a fair return upon the value of their railway property. It also

considered whether a participating carrier was an originating, intermediate or delivering line and all the circumstances, conditions and equities.

Thus, in *Star Grain and Lumber Co.* vs. *A. T. & S. F. Ry. Co.*, 14 I. C. C. Rep. 364, 370, the Commission said:

> "The phrase 'the just and reasonable proportion of such joint rate to be received by each carrier' necessarily implies that it is the duty of the Commission in fixing divisions to take into consideration all the circumstances, conditions, and equities that are necessary to arrive at what is a fair and proper adjustment of the situation as between the two roads, and precludes the idea that joint rates must be divided between the participating carriers on a mileage or any other fixed basis."

In *Investigation of Alleged Unreasonable Rates on Meats*, 23 I. C. C. Rep. 656, 661, the Commission said:

> "It is unnecessary to say that in making the above observations as to the additional allowance for the two-line haul when long distances are involved, it was not intended to intimate that a short line should be confined in its division of the joint rate to merely the amount which an application of the mileage scale would produce. *What is a fair division between carriers is to be determined in each case upon the merits of that particular case.*"

In *Class Rates from Chestnut Ridge Stations*, 41 I. C. C. Rep. 62, the Commission in fixing divi-

sions took into consideration operating expenses, traffic expenses and general expenses, value of road and equipment and the cost of main line operation as compared with branch line operation and also the element of a fair return.

In *Allowances to Kanawha, Glen Jean and Eastern*, 58 I. C. C. Rep. 405, decided in 1920, the Commission in fixing divisions took into consideration the element of a fair return.

When these factors which had always been considered by the Commission were enumerated in the Transportation Act there was no marked change indicating a new policy on the part of Congress. Nothing is more common, in amending a long standing statute which has been the subject of interpretation by courts or commissions than to put in statutory form the interpretations placed upon it.

(3) *Legislative history of the divisions provision in the Transportation Act.*

We are able to find only a single reference in the debates in Congress to the subject of divisions before the Conference Report came in. That was in a speech on December 19, 1919, of Senator GAY, who stated that he spoke in behalf of the short lines and pointed out that while the old statute gave the Commission authority to fix divisions, it was by no means certain that it gave "authority to fix the divisions of rates except in cases where the rates themselves are fixed by the Commission." And Senator GAY urged that the Commission should be given authority over all divisions (Cong. Rec. Vol. 59, p. 908). As we have shown, the Commission had ruled in different ways upon this subject.

The report upon the House bill (66 Congress, 1st Session, Report No. 456) said upon the subject of divisions after stating the terms of the measure:

> "The Commission upon complaint on its own initiative can compel a division of the rate. This is a matter in which the so-called 'short lines' are vitally interested. Often short lines refrain from making complaint against their trunk line connections because of fear of giving offense. By giving the Commission the initiative in such matters the short line is relieved in this respect."

It will be noted that the only object of the House bill in making changes in the law was to give the Commission power to take the initiative.

The Transportation Act in the form adopted accompanied the Conference Report, dated February 20, 1920 (66th Congress, 2nd Session, Report No. 650), and this report said upon the subject of divisions:

> "Section 417 of the House bill and Section 44 of the Senate amendment provided that the Commission might in case it found the division of any joint rate among the carriers to be 'unjust, unreasonable or unduly preferential or prejudicial,' establish a just and reasonable division of such rate and require adjustments to be made accordingly. The Senate bill mentioned certain factors to be taken into consideration by the Commission in determining proper divisions of rates. Section 418 of the Conference bill authorizes the Commission to establish 'just, reasonable and equitable

> divisions' when it finds said divisions to be 'unjust, unreasonable, inequitable or unduly preferential or prejudicial,' and adopts substantially the language of the Senate bill with respect to the elements to be considered by the Commission in reaching its decision."

In support of the Conference Report Mr. ESCH in the House on February 21, 1920 (59 Cong. Rec. 3268, Part 4), said:

> "I believe that in other respects we have well taken care of the short lines with respect to the matter of the rule of rate making. The short line as a rule got only a *pro rata* of the distance haul, did not get a *pro rata* of really what its service was worth. In this bill we prescribe that the Interstate Commerce Commission shall have the right, even on its own initiative, to create just and equitable divisions of the line connections and we prescribe what the Commission shall consider in arriving at what is a proper division of the rates."

In the Senate on February 23, 1920, Senator ROBINSON said (59 Cong. Rec. (Part IV), p. 3331):

> "The policy of the Conference Report accords generous treatment to the short line railroads. While there are a few short lines which should probably never have been constructed, considered as a whole the short lines are regarded by the Conference and are treated by this bill as indispensable to the industrial and commercial interests of the entire country, as well as the development of the various localities which they immediately serve.

> "The authorization to the Commission to initiate and require fair divisions of earnings, the establishment of through routes, and, under certain conditions, proper routings of traffic not routed by the shipper, are among the safeguards designed to prevent bankruptcy to this class of carriers."

Some of the amendments to the Interstate Commerce Act made by the Transportation Act were of the utmost importance. The provision granting authority to the Commission to review discrimination imposed upon interstate carriers by State commissions which was before this Court in the *Wisconsin Rate Case* (257 U. S. 563) where this Court spoke of the Act as a "new departure," did indeed mark a great advance in the law. So the rate provisions and those giving the Commission authority over securities involved almost revolutionary changes. But there were a great many more changes which were, in the language of the Senate Report upon the Senate transportation bill (66 Cong. 1st Sess. Rep. 204), were merely for the purpose of "remedying defects which have been disclosed in the administration of the present law."

With respect to the divisions amendment it is clear that no revolutionary purpose was intended by its enactment but that its object was to remedy, primarily for the protection of the short line roads, defects which had been considered to exist in the administration of the existing law. The jurisdiction of the Commission was made clear. The Commission was given power to act upon its own initiative. The elements entering into divisions were enumerated in the law. But we find

nothing in the history of the law indicating any such purpose as the Commission speaks of.

(4) *The Commission erred in its holding as to its authority.*

The primary obligation with respect to divisions is imposed upon the carrier. As we have seen, the first section of the Interstate Commerce Act (par. 4) makes it the duty of every common carrier "in case of joint rates, fares or charges to establish just, reasonable and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers."

It is only in case a carrier fails to do its duty that the Commission has authority to act and what it is required to do is what the carrier was bound, but failed, to do, to wit: establish just, reasonable and equitable divisions. In the performance of this duty the Commission is directed to consider various factors. Among these are the required revenues and the importance to the public of the transportation service of the respective carriers. But all of the enumerated elements must be taken into account in reaching the required result, and this result is not the maintenance of the credit of any railroad company. It is not even the keeping in operation of the transportation facilities of the country. It is a definite thing: a just, reasonable and equitable division of a joint rate.

The duty of maintaining a "transportation system for the nation" which the Commission apparently holds justifies it in making divisions to consider the "financial integrity and credit of

the carriers" is not prescribed by any provision in the divisions statute. It is not involved in the factor of "importance to the public," nor in that of the amount of revenue required to pay their respective operating expenses, taxes and a fair return upon their railroad property." It is a generalization impossible of application in the process of making just and reasonable division of a joint rate for a transportation service.

The factor of importance to the public can, except in a very limited class of cases, be taken into consideration in making divisions only in a general way. Indeed, it would be hardly practicable to give it any definite weight, except in a case when there is a real doubt whether a road *is* of importance to the public. There may be a fair question whether a branch road—tap line to lumber mill, plant facility or other branch—on account of changed conditions or for other reasons, should be continued or should be abandoned and dismantled. The question may also arise in extraordinary cases whether a larger road should ever have been built and whether it should be maintained. But in considering divisions as between two or more large railroad systems, like the parties to this proceeding, the question of importance to the public cannot arise except in the most general way. *Every railroad which furnishes transportation facilities to any substantial territory is of interest now to the public.*

The Commission in its first opinion well disposed of this matter (Rec. p. 47):

> "The 'importance to the public of the transportation services of' the complainants is conceded and of it we take judicial notice, as well as that of the principal defendants."

The provision regarding required revenue which we have just quoted is all that the divisions statute sys about finances. This, of course has application only to current expenses and a current fair return. The statute says nothing, in any other sense, about financial needs or credit. There is nothing to suggest power to consider a condition of need representing the accumulated results of unsatisfactory financial conditions or insufficient revenues in the past, much less one resulting from bad investments or past or present mistakes of management. It is expressly provided that in so far as taxes, expenses and a fair return are concerned the carriers participating in the joint rate to be divided shall *respectively* have the benefit of such considerations. And each participating carrier has an equal right to have the divisions fixed so as to allow its equitable share of the proceeds of the joint rate.

If Congress shold enact a statute relating to railroad *revenues* prescribing that prosperous roads should contribute portions of their revenues as determined by the Commission for the purpose of maintaining the financial credit of weak roads a basis might be afforded for an order like the one in question. Relieving the needs of the carriers would be the object to be accomplished; the matter would be one of *revenues*. But the divisions statute relates to *transportation*. Its object is to apportion justly a fund representing a joint transportation service. The value of the respective services is the ultimate thing to be determined. The decision of the Commission in this case could stand on a revenue statute such as we have suggested: the question would be whether such a

statute would be constitutional. It cannot stand, we submit, on the divisions statute.

As we have seen, the Commission said in its second report that it could consider the financial credit of the complainants and the sweeping order which it made without passing upon the real question of divisions indicates that it undertook to assist in carrying "the burden of maintaining the financial integrity" of the complainants. But there is nothing in the divisions statute authorizing the revision of divisions upon any such theory. The order cannot stand upon such a basis.

On the other hand if the needs of the complainants, upon which so much stress is laid in the opinion, be regarded as meaning the revenue requirements specified in the statute it is sufficient to say that an order cannot be based upon the consideration of that factor alone. A just, reasonable and equitable division of rates, must be reached by giving due weight to all the factors enumerated in the statute. Failure to do so constitutes an error of law. If the exercise of discretion be involved in determining what is the due weight to be given it is certainly an abuse to discretion to give all the weight to one factor and to disregard the others.

(5) *If the divisions statute can be construed as authorizing changes in divisions to maintain the financial integrity and credit of carriers the requirements of all participating carriers must be considered, not those of part of them.*

The real basis of the second report of the

Commission was as we have seen that the New England lines, as a group, needed money. The necessity for relief was determined before the method by which it was to be granted was prescribed. After discussing the relief required the Commission said (Rec. p. 118):

> "It remains to determine what form this immediate relief should take."

And then the Commission working backwards from the requirements of the New England roads increased divisions to supply them.

But as Commissioner HALL said in his opinion (Rec. p. 123):

> "Perhaps the defendants need the money as much and have a better right to it. On that we get little light and no facts on which to exercise a judgment."

If the divisions statute is to be given revolutionary effect; if in the guise of changing divisions moneys are to be taken from some roads and given to other roads to maintain their financial integrity and credit, it cannot be done upon any one-sided investigation. The financial needs of *each* of the roads participating in the division of a joint rate must be considered if the needs of one are considered. If, for illustration, the New Haven and Erie are parties to joint rates, the financial needs of the Erie require consideration in dividing them quite as much as those of the New Haven. If there be a public interest which requires the needs of the carriers to be relieved through a division of revenues it is not limited to any one carrier or any one group of carriers.

Upon what possible theory can it be said that the railroads in receivership, west of the Hudson River, which are named in the order, should yield up their revenues to meet the needs of the New England carriers? What is to be said about maintaining their "financial integrity and credit?"

FIFTH POINT.

If the Interstate Commerce Act be construed as authorizing the arbitrary transfer of revenues, it is unconstitutional.

Any statute providing for the division of joint rates is essentially a statute for the partition of property. When carriers render a joint service for a joint rate they own the moneys earned by their service jointly, and any statute which divides such moneys must do so with due regard to the respective services rendered. A law which purports to give one carrier more than another merely because it has greater needs would amount to the taking of property without due process of law. Congress could no more enact a law confiscating joint earnings in any such manner than it could directly provide that one railroad could take the property of another without making compensation. And that is what this divisions law does if the Commission is right in its interpretation of it. The Commission held in this case that, as a matter of practical administration, to relieve the needs of the New England roads, the law authorized it to turn over to such carriers a share

in the earnings of the other carriers sufficient to raise stated sums, and this without any finding whatever as to the comparative value of the service furnished by the several carriers in earning the rates to be divided. And if such power exists it is power to reduce all railroads to a common level; to give to the poor road because it is poor and to take from the rich because it is rich. Moreover, it makes little difference what form the exercise of such power takes; whether revenues be baldly diverted according to needs or whether the right of a carrier to a just share in that which it has participated in earning be denied by disregarding its equities and by compelling it to be governed by the conditions of others. A statute purporting to grant either power would deprive the carrier of its property without due process of law.

Certainly if the divisions statute is what it is regarded to be: "*the Commission's power is rapidly coming to be regarded as an engine for the equalization of earnings and income.*" (Commissioner DANIELS in the *Missouri and North Arkansas Case*) it is in violation of the Fifth Amendment.

SIXTH POINT.

The order in question is not supported by an adequate record and is, consequently, invalid.

I.

Every order of the Commission must find support in an adequate investigation resulting in a

record containing at least some evidence tending to its justification. Thus, in one of the earliest cases, *Interstate Commerce Commission* v. *Cincinnati etc. R. Co.*, 167 U. S. 479, this Court said (p. 509):

> "It is not to be supposed that Congress would ever authorize an administrative body to establish rates without inquiry and examination; to evolve, as it were, out of its own consciousness, the satisfactory solution of the difficult problem of just and reasonable rates for all the various roads in the country."

Numerous later decisions have made the rule explicit. An order made "without evidence" is arbitrary and will be set aside. As this Court said in *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 547:

> ". . . an order regular on its face, may be set aside, . . . (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence or without evidence to support it: . . ."

The jurisdiction of the Commission to fix rates, and it is the same in respect of divisions, must rest upon a finding, based upon evidence, that the rates superseded by the order are unreasonable; without evidence of unreasonableness, there is no power to make an order. This Court said in *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 92:

> "The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to

> make the order. . . . A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law and must, in the language of the statute, 'be set aside by a Court of competent jurisdiction.'"

II

The order in question cannot stand the test of the application of the above stated principles. It requires many carriers to supersede existing divisions as to which the record contains no evidence whatever. As to such carriers, the Commission assumes to hold the existing divisions unreasonable without knowing what they were. We appreciate that this is a broad negative statement but it is based upon a careful examination of the record and if there is any error it can be pointed out.

For example, the existing divisions of the following important railroads, located east of the Great Lakes and the Mississippi River were declared unreasonable and lower divisions ordered, although there was nothing in the record to show what the condemned divisions were: Bessemer & Lake Erie; Chesapeake & Ohio; Chicago & Alton; Cincinnati, Indianapolis & Western; Cincinnati, Lebanon & Northern; Detroit & Mackinac; Detroit, Toledo & Ironton; Hocking Valley; Kanawha & West Virginia; Pittsburg & Lake Erie; Toledo & Ohio Central; Wheeling & Lake Erie.

Other important railways required by the order to reduce divisions, although the Commission had no evidence showing what they were, include following: Atchison, Topeka & Santa Fe;

Denver & Rio Grande; Great Northern; Houston East & West Texas; Missouri Pacific; Northern Pacific; Southern Pacific; Texas & Pacific.

There is no evidence in the record as to any of the following parties to this appeal: Akron, Canton & Youngstown; Bessemer & Lake Erie; Central Indiana; Chesapeake & Ohio; Chicago & Alton; Cincinnati, Indianapolis & Western; Dayton & Union; Detroit, Bay City & Western; Indiana Harbor Belt; Kanawha & Michigan; Kanawha & West Virginia; Kansas City Southern; Pittsburgh & Lake Erie; Toledo & Ohio Central; Wheeling & Lake Erie.

But the inadequacy of the record is far more complete than the above illustrations indicate. The list (Rec. pp. 932-934) shows *two hundred and fifty-six carriers, all named in the order and required by it to reduce their divisions, although as to not one of them was the Commission advised as to the amount of a single one of the divisions which it condemned.* So far as the record shows, these divisions may be low or high, merely nominal and unremunerative or substantial and reasonable. All the record shows is that whatever the unknown divisions were, they were held to be unreasonable, and each of the many carriers was ordered to take less than the unknown sums it was receiving. It would seem that it would be hard to find a record so insufficient to support an order as this one is.

If the order in question affected rates instead of divisions, it might, perhaps, be suggested that, as all interstate rates are required by the Interstate Commerce Act to be published and filed

with the Commission, it might take notice of them, and that it is unnecessary that rates under attack should appear specifically in the record required to support an order. Even then it would seem that the record should show the fundamental fact essential to jurisdiction. But this *is a divisions case*, and no provision of the Interstate Commerce Act requires the publication or filing of divisions; the divisions affected by this case were not in fact published or filed.

III.

Counsel for the Commission in the District Court undertook to dispose of the absence of evidence of the divisions of many defendants by the contention that as none of these railroads reached the Hudson River or interchanged freight directly with the New England roads and that as the Commission only undertook to fix primary divisions between the roads on the two sides of the River and did not fix subdivisions, "it is manifestly immaterial whether or not there was evidence before the Commission of the amount of these subdivisions." The claim was also made that the railroads referred to were, with few exceptions, of little importance which participated in the traffic affected by the order to a negligible extent, if at all.

We have already named many railroads of importance and it is unnecessary to repeat them. Moreover all the two hundred and fifty-six railroads were made defendants by the complainants before the Commission. It would be strange if it were possible for complainants to cite in these defendants and to obtain an order requiring them to surrender portions of their earnings and then

avoid the consequences of an insufficient record by suggesting that it was of no consequence whether they had been brought in or not.

In this case the omission to consider the situations of numerous parties defendant has led to an anomalous result. The order in question required the Missouri & North Arkansas and the Kansas City, Mexico & Orient roads, as to neither of which was there a scintilla of evidence, to reduce their divisions in favor of the complainants. Almost contemporaneously, after having considered the needs of the Missouri & North Arkansas in another proceeding, the Commission entered an order (*68 I. C. C. Rep. p. 47*) increasing the divisions of that carrier on account of its needs. Again on August 9, 1922, having its attention called specifically to the needs of the Kansas City, Mexico & Orient, the Commission made still another order (*73 I. C. C. Rep. 319*) advancing its divisions also on the ground of its needs. How many additional carriers in the long list have needs which would justify similar action, could not be stated by the Commission, for it reduced all their divisions without having any evidence concerning them.

This defect in the record is not avoided by reference to primary divisions at the Hudson River. The existence of such divisions has nothing to do with the case. While the decision of the Commission was, as we have seen, based upon group evidence, the order which it made was directed to the individual defendants, whether directly exchanging traffic or not, and required them to give up fifteen per cent of their divisions to the complainants. How can it be said that the materiality of evidence concerning the divisions of a carrier

affected by the order depended upon whether it reached the Hudson River?

Curiously enough, the Commission, in its second report, (Rec. pp. 110, 114) recognized that it could not make an order in favor of a complainant which had failed to show its divisions. The reason for declining to include the Bangor & Arrostock, which was a complainant, in the benefits of the order, is stated in such report as follows:

> "Nor were divisions of the Bangor & Aroostock shown. Findings cannot be made with respect to any of these divisions, . . ." (Rec. p. 114).

Although, therefore, the Commission declined to make an order *in favor* of a party to the proceeding before it, for the reason that there was no evidence of the amounts of its existing divisions, the majority of the Commission did not hesitate to exercise its authority *against* other carriers who were defendants, in respect of divisions the amount of which were not disclosed by the record. It would seem that if this action can be sustained, the law is less favorable to the conferring of property without due process of law than it is to taking property away without due process.

IV.

No additions to the record upon which the Commission acted were made between the original (*Rec. p. 45*), and the second report (*Rec. p. 110*). The latter does not in any way contradict the findings or statements in the former and contains

no intimation that they were in any degree erroneous. It is, therefore, of the utmost significance that the gross infirmities of the record before the Commission are fully set forth in its original report. It is unnecessary to go beyond these explicit statements to show that there was insufficient evidence to support the order in question. A few extracts from the first report will establish this:

> "The evidence clearly indicates that the whole division blocking, which the Boston & Maine and New Haven witnesses denominate as 'absurd,' 'illogical,' and 'a mess of inconsistencies,' was pieced together without system; the divisions are inheritances. . . . The foregoing statement is vaguely illustrative of the large areas embraced and the absolute lack of consistency in the present blocking. Complainants do not seek to justify, but frankly condemn it; they have merely taken what the small lines had and have allowed such pieces to remain without change or material revision to remedy the long-existing condition. While there may be some portions of the present framework which could be retained, complainants' traffic witnesses concede that the entire structure, if such it may be called, must be rebuilt." (*Rec. p. 76*).

Yet, as we have shown, the Commission in its second report undertook to perpetuate and increase these inconsistencies, by making them the basis of horizontal and proportionate changes. In form and in effect, it prescribed as reasonable, new divisions proportioned to those which it thus declared to be without justification. The last state in which its effort

left the field was obviously worse than the first.

Referring to terminal allowances, which constitute a large element in the divisions allowed to the New England railroads, the first report said:

> "This record affords no ground upon which to determine the contention of the parties in respect of the allowances and arbitraries referred to." (*Rec. p. 78*).

Referring to the complainants' testimony and exhibits, it was also noted in the first report that they did not even purport to show that any existing division was unreasonable or unlawful.

> "The exhibits were not submitted to show that any particular division is unjust, unreasonable or inequitable; no attempt was made to deal with divisions individually; and all of complainants' traffic witnesses stated they dealt with the situation only 'as a whole.' One witness for complainants said 'there are spots as shown on this exhibit indicating that the division is a fair division." (*Rec. p. 79*).

Yet the fair divisions which the complainants' own witnesses declared to be fair and just, were condemned along with the others, and defendants were ordered to sacrifice their revenues for the purpose of adding to those that were thus recognized as indisputably sufficient.

Concerning "Southern divisions' the Commission said in the first report:

> "We have shown that rates in traffic between New England and Southern territory are divided on the basis of specifics. . . . The . . . record does not afford a basis upon which to determine that issue." (*Rec. p. 87*).

On the subject of "Transcontinental divisions" the Commission said in the first report:

> "Complainants strongly emphasize the fact that the inadequacy of the Eastern roads' divisions on transcontinental traffic is admitted by some of the trunk lines. Such an 'admission' is of no probative force against the transcontinental roads, none of which was represented at the hearing." (*Rec. p. 88*).

Notwithstanding the foregoing, which stands unreversed, the Commission, without evidence, required these Transcontinental roads to sacrifice revenue in aid of the New England roads.

V.

Under the heading "Conclusions" the Commission said in its first report:

> "No evidence of the reasonable and equitable measure of divisions other than 'as a whole' has been offered." (*Rec. p. 91.*)
>
> "No method by which the apparently incongruous plan of divisions now in force might be readjusted has been submitted and we are thus left to deal with the situation in the light of generalizations which can lead only to speculative ventures upon an unknown field." (*Rec. p. 91.*)
>
> "The various methods which have been suggested to alleviate the financial condition of the New England lines and to insure to them just, reasonable, and equitable divisions, indicate in themselves the uncertainty of their application and it is apparent that if adopted they would not only perpetuate the

inconsistencies to which complainants refer but would create new preferences and prejudices." (*Rec. p. 91.*)

"The age of the divisions affords no presumption that they are unreasonable; it may be that they were too liberal originally. The record fails to show clearly that relatively the New England lines have had exceptional handicaps which their competitors have not encountered." (*Rec. p. 92.*)

"The relatively high proportion of passenger traffic on the principal New England roads has been especially stressed, but how that high proportion should be translated into increased divisions of freight rates for the complainants is only vaguely and indefinitely indicated." (*Rec. pp. 92-3.*)

"The effect of the cost of labor in New England has been stated in gross amounts, . . . but it may be that defendant roads operating in sparcely settled communities were also adversely affected by wage increases." (*Rec. p. 93.*)

"Terminal services should be more efficiently performed, and it may be that their costs are not adequately reflected in the rates, but nothing positive or definite is presented on this point." (*Rec. p. 93.*)

"* * * the record affords no foundation upon which might rest a valid prescription by us of divisions, * * * " (*Rec. p. 94.*)

"*We are authorized to prescribe only just, reasonable, and equitable divisions 'to be received by the several carriers.' Full hearing and competent and relevant evidence are prerequisite. Any attempt to prescribe*

a blanket increase of divisions as here sought in the face of admissions and uncontradicted evidence that certain divisions are now just, reasonable, and equitable to complainants would override the plain mandate of law." (*Rec. p. 93.*)

Nothing in the second report of the Commission in any way withdraws or varies anything contained in the foregoing extracts from the first report. All that the Commission was able to say in reversing its original position was that upon reconsideration it had concluded that its authority extended to the transfer of revenues between groups of roads pending a determination of the real divisions questions.

VI.

In its first report, the Commission emphasized the fact that freight interchanged by railroad between New England and other portions of the United States, is moved in the same car from point of origin to point of destination.

> "There is no break of bulk of carload shipments during the transportation and, therefore, the type of the car, the commodity, the weight of the load and many other incidents of the through joint haul must be the same within and without New England." (*Rec. p. 50*).

It follows from the foregoing, that these cars bear the same loads on both sides of the Hudson river. If there is any difference in the average lading per car that operates unfavorably to New England carriers, it must result from lighter

loading of freight which has its origin and destination within New England. Moreover, the work of a locomotive has never more than three elements; namely, (1) moving the weight of the car, (2) moving the load in the car and (3) overcoming frictional resistance. These elements must be the same as to interchanged freight moving in the same cars and to vary only by reason of differences arising from freight that is not interchanged. If the freight train-load in New England is lighter than in other portions of the United States, it must be due to failure of the New England carriers to increase the tractive power of locomotives, and to reduce grades as rapidly as those improvements have been made west of the Hudson river, or else to less efficient utilization of motive power. It will also be idle to suggest that weather conditions are more adverse to railroad operations in New England than in much of the territory occupied by the lines of appellants.

Although the above finding is in no way contradicted by the second report, the important facts which it epitomizes were ignored by the Commission and the District Court in their limited discussion of comparative conditions. This serves to illustrate the inadequacy of the consideration given by the Commission in its second report to the subject of divisions and to emphasize what we have repeatedly said, that the decision in question can be regarded as a divisions decision only in form.

VII.

That the order is not based upon evidence manifestly requires that it be set aside. The carriers as to whose divisions there is no evi-

dence in the record on which the Commission acted constitute so large a proportion of those affected, and the traffic movements in which they engage are so related and inter-related with the traffic movements of other carriers affected by the order, that it cannot be considered as separable or that the order can be void as to them and valid as to the others. Plainly the Commission intended to make a comprehensive order, and if it is not valid as to a considerable number of the carriers to which it was directed, it cannot be the order which the Commission intended and must fall as a whole.

CONCLUSION.

A joint freight rate is a definite thing. The divisions of joint freight rates, when made, are definite things. The making of them is a matter of just adjustment. The end to be accomplished when the carriers negotiate themselves or when the Commission revises is the making of a just, reasonable and equitable division. The divisions statute is intended to accomplish this and nothing else.

But the divisions statute is the only means by which the Commission can effect a transfer of revenues from one railroad company to another and, as we view it, the zeal of the Commission to keep all the railroads of the country going has lead it to seize upon the divisions statute to accomplish an object entirely outside its purpose. It has used that statute as an instrument to inaugurate a change in public policy towards railroad corporations; to create a unitary system in which

prosperous railroad companies shall carry the burdens of weak railroad companies. While railroad companies have been the subject of public regulation, it has never before gone to the extent of requiring them to turn over their property to others. Action of that kind has always been regarded as confiscatory and we insist that it is contrary to the Constitution. But if action of that kind can be taken; if there is to be any such revolutionary change in public policy which puts at hazard private property in railroads, it should be the result of deliberate action by Congress, expressed in words as to the meaning of which there can be no mistake. It is startling to think of such a change being accomplished by the action of an administrative tribunal in reversing itself and putting a strained interpretation upon a vague word or phrase in a statute relating to the division of freight rates.

For these reasons it is contended that the decree of the District Court of the United States for the Southern District of New York should be reversed and that the cause should be remanded with instructions to grant the interlocutory injunction prayed for.

Respectfully submitted,

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H. T. NEWCOMB,
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New York, December 18, 1922.

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New York, refusing to enjoin enforcement of an order of the Interstate Commerce Commission, which order directs that railroads outside of New England pay increased proportions of joint through rates to certain railroads within New England, comprising most but not all of the railroads therein.

The appellant Erie Railroad Company and its subsidiary the Chicago and Erie Railroad Company, whose stock it owns, operate connecting lines of railroad which together make up the through line between New York and Chicago commonly called Erie Railroad and they will be referred to herein for brevity as the Erie.

The general "Brief for Appellants", filed by other counsel, states the issues as framed before the Interstate Commerce Commission and the history of the litigation, and deals with all the issues of the case.

The Erie appellants are among the carriers outside of New England who are all required to give up to the complainant New England Lines a stated portion of the revenue formerly enjoyed by them from joint through rates.

The portion of joint rate revenue thus to be turned over is determined by percents of the revenue fixed by the Commission, namely; fifteen per cent of the former New England revenue on rates where New England revenue was less than revenue to lines outside of New England, and fifteen per cent of the former revenue outside of New England on rates where that revenue

was less than the New England revenue. These percents apply alike to all contributors, unless they agree to a different division among themselves of what the Commission allows them to retain in the aggregate, and these percents apply alike to all recipients, according to their former receipts, without any distinction between any contributors or any recipients.

The Interstate Commerce Commission's order does not purport to be based on any consideration of the individual carriers from whom revenue is taken, as compared with the individual carriers, parties to the same joint through rates, to whom revenue thus taken away is given.

These facts comprise the issue which this brief is designed to discuss, and it is therefor superfluous to repeat the full statement of the case contained in the "Brief for Appellants" filed by other counsel.

A separate brief is filed for the Erie for the purpose of developing the special bearing upon it of the method of consideration and form of order adopted by the Commission.

II.

Specification of Errors.

This brief is addressed to the contention that the decree of the District Court is erroneous in that the Court erred:

In holding that the Interstate Commerce Commission has authority to increase the revenues

of one group of carriers at the expense of another group of carriers by increasing the divisions of joint rates of the one group and decreasing those of the other group, without giving consideration to the separate situation of each of the carriers in each group.

In refusing to hold that said amended order is invalid because it deals with groups of carriers as such, and not separately with the carriers respectively entitled to share in the joint rates.

In refusing to hold that such amended order is invalid because based wholly upon group statistics which are incompetent and irrelevant in determining equitable and just divisions as between the several carriers interested.

In holding that there was "typical evidence" before the Interstate Commerce Commission in said proceeding to justify said amended order as against these appellants.

In refusing to hold that said amended order is invalid because it is arbitrary.

This brief discusses these errors with special reference to the appellants Erie Railroad Company and its subsidiary the Chicago and Erie Railroad Company.

ARGUMENT.

The Commission exceeded its statutory power in proceeding to fix divisions on the basis of groups of carriers. The Erie has a special interest in the adherencc by the Commission to its statutory field in this particular.

That the Commission's order was based on facts and inferences relating to groups as distinguished from individual carriers we believe has not been seriously disputed. If it shall be disputed the facts and quotations from the Commission's opinions in this case, which are given under the "First Point" of the general "Brief for Appellants" will demonstrate it.

The justification for emphasizing this fact on behalf of the Erie in particular lies in the history of the "Transportation Act, 1920" (41 Stat. L. 484) which added the present Section 15 paragraph (6) to the Interstate Commerce Act and in the purposes of the "Transportation Act, 1920". One of the purposes of the "Transportation Act, 1920" was to set up a system of rate and division regulation which would avoid as far as practicable the difficulties inherent in competition between carriers of unequal strength but all essential to the public service. That this was present in the mind of Congress is shown by a recital of fact contained in the Act itself, and that Con-

gress went to the usual length of incorporating reasons in the language of the statute itself is significant.

The recital referred to is contained in Sec. 15a paragraph (5) of the Interstate Commerce Act, added by the Transportation Act, 1920 as follows:

> (5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States."

In his dissenting opinion in connection with the Commission's first Report in the present case, Commissioner Eastman said:

> "In the hearings which preceded the Transportation Act, 1920, attention was continually directed to the problem of the weaker roads. It was realized that the rule of rate making in Sec. 15a would produce uneven results and leave this problem unsolved." (62 I. C. C. 513 at p. 568. Rec. p. 97.)

While the language of the statute seems to be explicit in requiring consideration of individual carriers, as distinguished from groups of carriers in division cases, the action of the Commission shows that it has construed the statute otherwise. In that sense there may be said to be a "doubt as to its construction", and if it exists the intent of the members in charge of the bill in Congress, as evidenced by the "Congressional Record", is pertinent.

(*Winconsin R. R. Comm. et. al.* vs. *C. B. & Q. R. R. Co.*, 257 U. S. 563, at p. 589).

The "Congressional Record" is replete with references to the importance of this question. A just statement on the subject is that of Mr Esch, then Chairman of the Committee on Interstate Commerce of the House of Representatives and a Conference Manager of the House, in presenting the Conference Committee's report on the bill which became the "Transportation Act, 1920." He said:

> "The large problem that has given difficulty to the Interstate Commerce Commission and to every regulatory body heretofore has been the fixing of rates on competitive traffic which will not allow one road to earn excessive income while another road on the same rate does not get a sufficient income." (59 Cong. Rec. 3269 Part 4.)

Congress attempted to meet this difficulty by legislation containing three distinct but interdependent provisions, namely;

1. The making of *rates* on the basis of groups of carriers rather than solely on the basis of the individual carrier. (Section 15a paragraphs. (2) to (4) Interstate Commerce Act)

2. The absorption in a public fund, to be used for the development of the railroads in general, of amounts earned above a fixed standard, by any of the carriers who might be able, under the group rate basis, to exceed the standard set. (Section 15a paragraphs (5) to (16) Interstate Commerce Act.)

3. The assistance, through *dirisions* of joint rates, of the weaker carriers, so as to enable them to more easily approach, if not to reach, the statutory standard of a reasonable return to the group as a whole. (Section 15, paragraph (6), Interstate Commerce Act)

The consideration of the individual carrier in fixing *divisions* is as essential a part of the statutory plan as is the submergence of the individual carrier in the group for purposes of *rate* making.

The maintenance of the distinction between rate making by groups and division making by individual roads is as essential a part of the plan as any other feature.

The consideration of the individual carrier in fixing divisions is a statutory corrective of results to individual carriers which are inevitable from group rate making, and this corrective is wholly destroyed when the individual carrier is submerged in a group in considering divisions.

The varying needs and requirements of different sections of the country are to be cared for, under the statutory plan, by the grouping of carriers for the purpose of fixing the rates

The varying needs of individual carriers in the group are to be cared for, so far as practicable, by adjustment of divisions based on their individual situations.

It is a matter of general knowledge that the Erie is historically the oldest and one of the most important and conspicuous of these carriers of lesser financial strength and greater difficulties of profitable operation, as compared with its most immediate competitors. It is, therefore, obviously one of those carriers whose position the "Trans-

portation Act, 1920", was intended to strengthen, through the paragraph relating to divisions. It therefore seems appropriate for the Erie individually to call attention to what seems to it a distortion of the statute, whereby Sec. 15, paragraph (6) of the Interstate Commerce Act is made the basis of imposing on it a very heavy additional burden instead of aiding it.

This distortion consists in making use of Sec. 15, paragraph (6) to support an order to care for the needs of the carriers of a group, at the expense of the carriers of another group, without regard to the comparative situation of the individual carriers.

There is no sanction in the statute for that method, no matter whether the object is praiseworthy or not, as the statute plainly says that the Commission shall consider facts as to the "several" carriers. (Sec. 15, paragraph (6) Interstate Commerce Act.)

The "Brief for Appellants" filed by other counsel, points out that the statute provides with "sedulous care" for consideration of the individual carrier as to divisions, by directing that the Commission "shall" consider the "*respective* operating expenses" affecting the "*several* carriers" as to whether "any *particular* participating carrier" is an originating intermediate or delivering carrier and shall prescribe divisions "to be received by the *several* carriers."

There is no mention of groups here, as there is in Sec. 15a relating to rates, as distinguished

from divisions, and the language used in regard to divisions is entirely inconsistent with submergence of the individual carriers in a group.

Attention is called to another well-known fact bearing on the intent of Congress. The so-called "short line railroads" presented a serious problem to Congress, and as they are scattered all over the country and are vitally necessary to the communities they serve, and are usually locally owned, and there are many more of them than there are of the larger roads, their situation bulked large in the mind of Congress.

Mr. Esch said, in presenting the Conference Committee Report to the House of Representatives:

> "Another thing I wish to call your attention to is in regard to the short line railroads. I do not think any one subject in connection with the bill has caused more discussion and aroused a greater interest than the short line railroads. We have sought to deal generously with these carriers."
>
> (59 Cong. Rec. 3268 Part 4.)

On the same page of the "Congressional Record" appears Mr. Esch's only reference in his remarks to the provision for divisions, and it will be noted that he deals with it solely from the standpoint of the effect on the short lines:

> "I believe that in other respects we have well taken care of the short lines with respect

to the matter of the rule of rate making. The short line as a rule got only a *pro rata* of the distance haul, did not get a *pro rata* of really what its service was worth. In this bill we prescribed that the Interstate Commerce Commission shall have the right, even on its own initiative, to create just and equitable divisions of rates between the short line and its trunk-line connections, and we prescribe what the commission shall consider in arriving at what is a proper division of the rates. We also take care of them in the matter of the diversion of traffic. They have often suffered because the trunk line would divert traffic from the short line. We take care of them also with regard to traffic which is not routed by the shipper, but which the trunk line could at junction or terminal points divert to a favorite carrier. We take care of that situation." (59 Cong. Rec. 3268 Part 4.)

Senator Robinson, a minority party member of the Senate managers of the conference, likewise stated to the Senate the intent to deal generously with the short lines, and added:

"The policy of the conference bill accords generous treatment to short-line railroads. While there are a few short lines which probably should never have been constructed, considered as a whole they are regarded by the conference and are treated in this bill

as indispensable to the industrial and commercial interests of the country as a whole, as well as to the development of the various localities which they immediately serve

The authorization to the commission to initiate and require fair divisions of earnings, the establishment of through routes, and, under certain conditions, proper routings of traffic not routed by the shipper are among the safeguards designed to prevent bankruptcy to this class of carriers."

(59 Cong. Rec. 3331 Part 4.)

This purpose to deal generously with the short lines and to aid and protect them through regulation of divisions is obviously set at nought, and the opposite result produced, so far as the effect of the order under consideration is concerned, as to every needy short line in the United States outside of New England, which participates in rates to or from New England.

From every short line in the country outside of New England which participates in traffic endorsing through rates to or from New England some revenue is taken away, to be given to New England lines.

The needs of sections of the country are to be provided for through rate regulation, not division regulation, and the distortion of the statute as to divisions to care for the needs of a geographical section necessarily defeats the purpose of the statute as to individual carriers.

SECOND.

The record contains no evidence to support the Commission's order to the Erie to relinquish a portion of the revenue previously enjoyed by it to any of the individual carriers in New England in whose favor the order is made.

The Erie System has been submerged in a group, and the essential facts are not shown as to it individually, or if shown, furnish no evidence which supports the order.

There is no doubt that the Commission decided this case on evidence relating to groups of carriers and not on evidence relating to individual carriers, parties to joint through rates. The reports of the Commission, both its original report and the report accompanying its final order after rehearing clearly show that this is so.

The state of the record as between the Erie System on the one hand and the New Haven System on the other illustrates so clearly the basis of the Commission's action and the questions which such action raises as to the rights of the individual carrier, that it has seemed to justify a separate statement of these facts.

In considering what is here said it should be borne in mind that there is a vast difference between the question of whether the Commission

must deal in meticulous detail with each division of each carrier on each rate and have evidence upon each such division before acting, and the question of whether a carrier may be completely submerged in a group of other carriers and have imposed on it a whole body of divisions which could never be justified as between the participating carriers apart from their respective groups.

The Erie does not contend that the Commission must have evidence before it, as to each and every division of each and every carrier. They do contend that in the fixing of divisions under Sec. 15 paragraph (6) each carrier involved is entitled to have the several considerations imposed upon the Commission by the statute, considered by the Commission as to such carrier individually, as compared with other participating carriers individually, and that the Commission is not warranted in reducing any carrier's divisions if this individual comparison does not warrant it, and if the reduction can be based only on a comparison of groups, which produces results contrary to those produced by individual comparison, such reduction is beyond the Commissioner's power.

Even if it could be conceded that the Commission is not required to consider the individual effect upon each and every participant in the joint undertaking, but may classify the participants in a joint through rate and divide the joint revenue between such classes of participants, it would, we think, still be clear that as between two connecting lines these participants in a joint

undertaking cannot have their proportions of the joint proceeds divided on the basis of considerations which have no relation to them, and considerations which can be arrived at only by submerging them in groups with carriers that were not participants in the same joint undertaking.

The record shows that such submergence is just what has happened to the Erie in this case as between it and the New Haven System, its only direct New England connection and indeed as between it and each of the New England lines favored by this order.

We do not understand that it has been claimed by or on behalf of the Commission that it had evidence before it sufficient to justify the Commission's present order if it were an order addressed to the Erie System alone in favor of the New Haven System or of the New England Lines, or even if it were an order addressed to the Erie and its Western connections alone in favor of either the New Haven or the New England lines. We shall refer in turn to each of the considerations which the statute says the Commission shall consider as affecting "the several carriers".

The Efficiency with which the Carriers are Operated.

There is no evidence as to the relative efficiency on the Erie as compared with the New Haven, or

with other New England lines or with the New England complainant lines as a whole.

This is the first of the matters which sec. 15 paragraph (6) specifically requires that the Commission shall give due consideration.

There is some evidence in the record to the effect that the New Haven has operated with a progressive decrease in man hours expended per unit of traffic and that large sums have been expended by it for improvements, designed to secure still better results for the energy, man power, and money expended, per unit of traffic. For the purpose of this argument it may be conceded that the record contains enough to justify the Commission in finding that the New Haven is efficiently operated within the meaning of sec. 15 paragraph (6).

There is, however, no evidence in the record as to the efficiency of operation of the Erie System separately or of the Erie System and its western connections.

It is obvious therefore that there is no evidence in the record to justify the reduction of the revenues of the Erie System or of the Erie System and its connections in favor of the New Haven system or of any of the New England lines, because of comparative efficiency of operation, or lack of efficiency of operation on the part of the Erie or its connections.

Probably in no case would the factor of efficiency of operation of itself justify a change in

divisions, and it is perfectly clear that the absence of all such evidence with respect to the Erie and its connections makes it impossible to justify the order in this case on the ground of efficiency of operation.

The statue clearly requires each of the New England lines to make sufficient evidence to satisfy the commission that they are efficiently operated, and the record should contain information to satisfy the commission on that point. There is some evidence as to the New Haven and a lesser amount as to the Boston & Maine, but none at all as to some of the New England Lines.

The amount of revenue required to pay their respective operating expenses, taxes and a fair return on their railway property.

The record does not show that the New Haven's needs are any greater than the Erie's.

There is some evidence comparing the New Haven System and the Erie System in this particular.

It shows that during some of the periods covered by the record the Erie was in greater need of additional revenue to pay its operating expenses, taxes and a fair return on railway property than the New Haven and that up to the

latest period which it was possible to cover in the record before the Commission, the Erie was in substantially as great need of additional revenue for such purposes as the New Haven.

During the period of Federal control terminating February 29, 1920, the Erie System incurred an average annual net railway operating *deficit* of *$1,568,889.*, whereas the New Haven System earned an average annual net railway operating *income* during the same period of *$5,203,226*, and 7 New England complainant roads earned an average annual net railway operating *income* of *$4,477,989* (Brigham Ex. 1 Rec. p. 191 Defendants Ex. 96 Rec. p. 635). During the same period, while the Erie System was incurring a net railway operating *deficit*, the New Haven System was earning a net railway operating *income* equivalent to *35.1% of the* standerd return payable by the United States under the Federal Control Act, and 8 New England lines were earning 12.8% of such standard return. (Cunningham Ex. 16 Rec. p. 204, Defendants Ex. 98 Rec. p. 635.) That on the basis of the year ending June 30, 1920, "Adjusted" according to an estimate made by complainants' witness Brigham, adopted here only for the purpose of making this comparison, the Erie System's net railway operating income on property investment as of October 31, 1919 was but 1.64% as against 1.37%for the New Haven System and 1.04% for the 7 New England roads. (Brigham Ex's. 1 and 3 Rec. pp. 191-192; Defendants Exhibit 96 Rec. p. 634)

During the first 11 months of the calendar year 1920, the net railway operating *deficit* of the Erie Railroad *exceeded* that of the New Haven System by over *$2,000,000.*

It was estimated at the time of the earlier hearings, on a basis of computation devised by one of the New England witnesses that the New Haven and New England complainant lines with two exceptions would fail to earn fixed charges during the year ending June 30, 1920. On the same basis the Erie encountered a similar failure. (Brigham Ex. 3 Rec. p. 192. Defendants Ex. 97 Rec. p. 635.).

On actual results during the first 11 months of the calendar year 1920, the net railway operating *deficit* of the Erie Railroad exceeded that of the New Haven System by *over $2,000,000.* (Defendants Ex. 99 Rec. p. 635.)

During the 3-year test period referred to in the Federal Control Act, comprising the 3 years ended June 30, 1917, the ratio of total operating expenses to operating revenues on the Erie System was 72.43% as against 67.6% on the New Haven System and 69.8% on 7 New England lines complainants in Docket 11756, while during the period of Federal control the ratio of total operating expenses to operating revenues on the Erie System was 97.34% as against 87.6% on the New Haven System and 91.5% on the 7 New England lines. In both periods the ratio of "Transportation expenses", that is, roughly speaking the direct cost of running trains and sending, was

higher on the Erie than on the New Haven, and practically as high on the Erie as on the 7 New England complainant lines. (Defendants Ex. 100 Rec. p. 636).

This it is believed ~~contains~~ comprises all the evidence in the record which bore any relation to the corparative amount of revenue required to pay the respective operating expenses, taxes and a fair return on their railway property, of the Erie on the one hand, and the New Haven System, its principal and only direct New England connection on the other.

There are some corresponding figures for other New England lines, which in the "Defendants Exhibits" were consolidated. Their relation to the Erie figures varies somewhat in the individual cases as compared with the New Haven figures The results when combined are stated above and the individual figures may be seen on the Brigham and Cunningham Exhibits referred to:

Evidence of this character clearly does not support an order reducing the Erie's proportion of revenue.

It tends, rather, to show that the Erie has a greater need for additional revenues for the purposes mentioned in the statute then the New Haven System and most of the other New England complainants.

On the hearing before the District Court these appellants submitted an affidavit of Henry Adams extending the statistics of the Erie and the New Haven to a period later than could be covered at

the time the hearings before the Commission closed, bringing the figures down to the end of 1921. This showed a continued great need of additional revenue by the Erie, neither the Erie or the New Haven earning as much as 1% on property investment in 1921 (Rec. p. 919).

The importance to the public of the transportation services of such carriers.

There is no evidence in the record as to the relative importance of the Erie and the New Haven to the public.

The Commission said:

> "The importance to the public of the transportation services of the complainants is conceded, and of it we take judicial notice, as well as of that of the principal defendants" (Rec. p. 47, 62 I. C. C. 513 at p. 516.)

It seems quite clear that there is nothing in their relative importance to justify reductions in the Erie's revenues for the benefit of the New Haven or other New England roads and there is certainly no evidence purporting to justify it on that ground. The public importance of such large carriers is so obvious that this factor has no real place in a divisions case between them.

Whether any particular participating carrier is an originating, intermediate, or delivering line.

Of course the New Haven System and the Erie System each partakes, on their interchange traffic, of the character of an originating an intermediate or a delivering line according to the circumstances of the particular shipment. Neither one is exclusively an originating or delivering line on this interchange business, as a tap line or a short terminal railroad frequently is as to all of its traffic. There is no dispute that the New Haven handles a substantial amount of overhead traffic, that is traffic on which it is an intermediate line, and there is nothing in the record to show the extent to which the Erie is an intermediate line as compared with the New Haven on the business which they interchange and which is affected by this order. Therefore there is no basis for a comparison between the Erie and the New Haven as to the extent to which each is an originating, intermediate or delivering line. What is stated in this paragraph is equally applicable as between Erie and the other individual New England complainant carriers.

Other facts or circumstances which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

There is no evidence at all in the record of

any such facts or circumstances as between the Erie System or the Erie System and its connections, on the one hand and the New Haven System or the New Haven System and its connections, or the New England Lines on the other hand, except certain comparative figures as to the cost of fuel. The evidence on this subject clearly indicates that the New Haven System is in a position to obtain its fuel, as conditions change, and when the hearings closed was obtaining it, at a greater saving in cost than the Erie could accomplish, as compared with the earlier portion of the time covered by the record.

The record shows that for some reason the New Haven cost of fuel at the mines increased in greater proportion during 1920 than that of other roads, which afforded an opportunity for a greater saving thereafter as compared with 1920. (Cunningham Ex's 27 and 28 Rec. p. 219 Defendants Ex. 101 Rec. p. 636). The record shows that very substantial decreases have occurred in the cost of water transportation since the period covered by the statistics in the record and that this largely reduces the cost of fuel to the New Haven, whereas the Erie does not benefit from it. (Defendant's Ex. 102, Rec. p. 639.)

These facts tend to weaken, not to support, the case of the New Haven as against the Erie and we cannot find any other facts and circumstances not related to mileage haul and not above referred to, shown by the record, which bear on the question, and which relate to the Erie as

compared with the New Haven or with any other New England complainant considering them individually, coupled only with their respective subsidiaries, and not grouped with other carriers which are not participants with them in the same joint through rates.

The Commission's first report in Docket 11756, summarizes the testimony in the record at length, and contains nothing to support the order as against the Erie considered individually and compared with any individual New England line or the New England Lines in the aggregate.

In the second report, on which the order under review is based the Erie is not mentioned.

Mileage haul, while mentioned in the statute only to show that it is not to be controlling (Sec. 15 paragraph (6)) is certainly not to be disregarded. On this the record shows a mass of comparisons between the Erie and the New Haven and between the Erie and other New England lines, although these comparisons are by no means exhaustive.

These comparisons show varying results but it will not be disputed that as between the Erie on the one hand and any one of the New England lines on the other there has been no claim or evidence that the Erie in the aggregate got any more if as much, as its mileage proportion of joint rates.

The Commission's order as against the Erie comes within the rule condemning orders of the

Commission as beyond its powers, when made without evidence to support them.

(*Interstate Commerce Commission* vs. *Union Pacific R. R. Co.*, 222 U. S. 546; *Interstate Commerce Commission* vs. *Louis. & Nash. R. R.*, 227 U. S. 88, at p. 91.)

The cases cited and other similar cases are rate cases, not division cases, but the right of one participating carrier to its just portion of the proceeds of the joint undertaking, as against other participating carriers, is a property right, entitled to the same protection against arbitrary action by the Commission as is the joint right of all participating carriers to exact a reasonable rate from the shipper. Furthermore, the statute itself requires "full hearing" as a condition precedent to a division order by the Commission which is the same requirement as made regarding rate cases. (Sec. 15, paragraph (6); Sec. (13) paragraph (4); Interstate Commerce Act.)

CONCLUSION.

We believe it is undisputed that the Commission acted in this case on the basis of consideration of groups of carriers and not on the basis of comparing individual carriers. This we contend is contrary to the plain language and inconsistent with the purpose of the statute

when applied to divisions. We contend that the record contains no evidence to justify or support an order of the Commission requiring the Erie to surrender revenue from joint rates to New England lines.

Therefore, the decree of the District Court should be reversed and the case remanded for further proceedings accordingly.

Respectfully submitted.

GEO. F. BROWNELL,
H. A. TAYLOR.
Counsel.

January, 1923.

Supreme Court of the United States.

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY ET AL.,
Appellants,
v.
UNITED STATES OF AMERICA ET AL,
Appellees.

October Term, 1931.
No. 666.

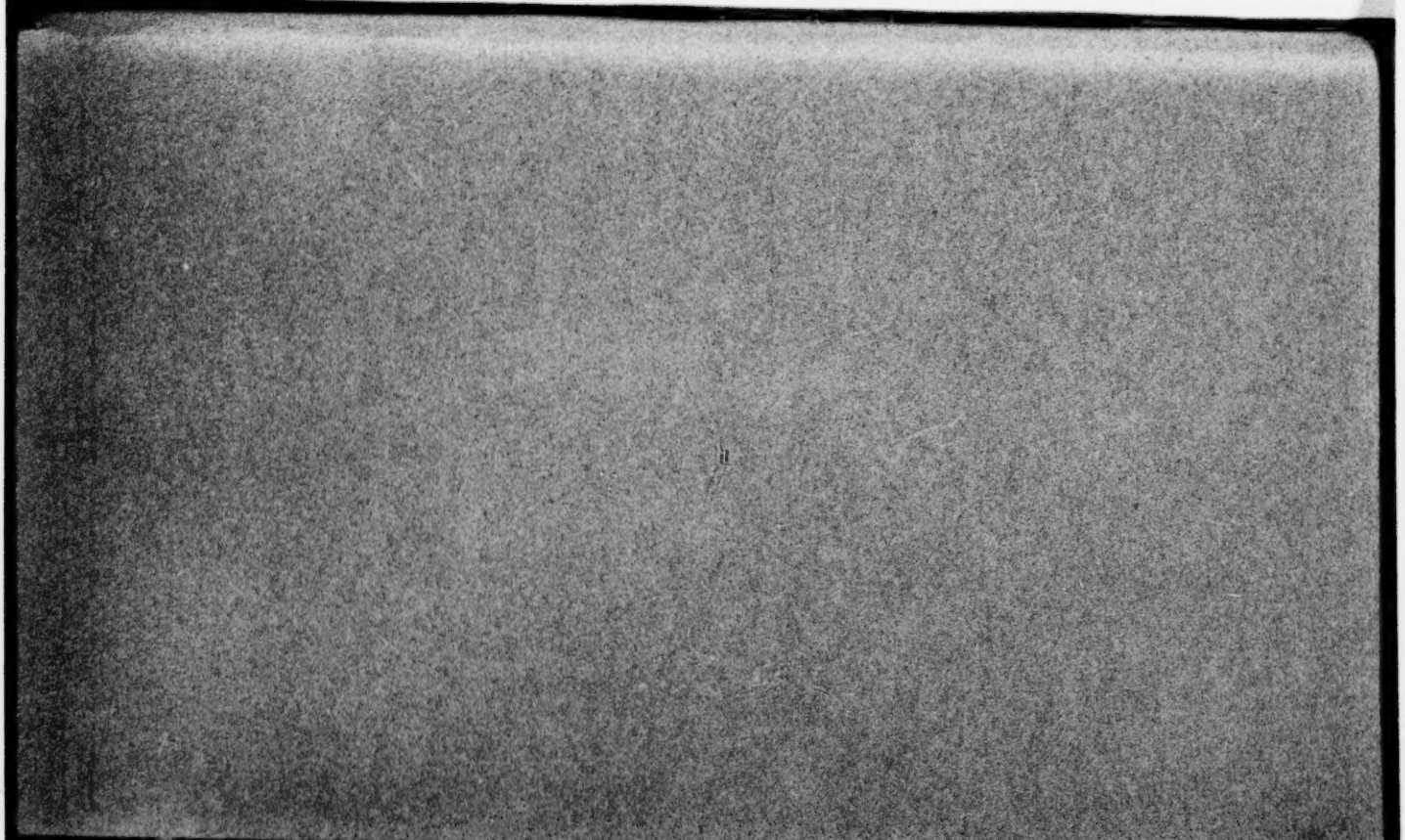
BRIEF

FOR

The Boston & Maine Railroad,
The Bridgton & Saco River Railroad Company,
The Central New England Railway Company,
The Central Vermont Railway Company,
The Maine Central Railroad Company,
The Montpelier & Wells River Railroad,
The Rutland Railroad Company,
The Sandy River & Rangeley Lakes Railroad,
The St. Johnsbury & Lake Champlain Railroad Company,
The New York, New Haven & Hartford Railroad Company,
(The New England Lines),

Appellees.

CHAS. F. CHOATE, Jr.,
JAMES GARFIELD,
of Counsel.



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Supreme Court of the United States.

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY ET AL.,
Appellants,
v.
UNITED STATES OF AMERICA ET AL.,
Appellees.

October Term, 1922.
No. 646.

BRIEF
FOR

The Boston & Maine Railroad,
The Bridgton & Saco River Railroad Company,
The Central New England Railway Company,
The Central Vermont Railway Company,
The Maine Central Railroad Company,
The Montpelier & Wells River Railroad,
The Rutland Railroad Company,
The Sandy River & Rangeley Lakes Railroad,
The St. Johnsbury & Lake Champlain Railroad Company,
The New York, New Haven & Hartford Railroad Company,
(The New England Lines),

Appellees

STATEMENT OF THE CASE.

This is an appeal from a decree of the District Court for the Southern District of New York (three United States Circuit Judges, sitting in the District Court pursuant to the Act of October 22, 1913 (38 Stat. 220)) denying an interlocutory injunc-

tion. The petition in the District Court sought to enjoin, set aside, annul and suspend the enforcement of an order of the Interstate Commerce Commission entered January 30, 1922, on the Complaint of the New England Lines for an increase of their divisions with the petitioners and other roads under the provisions of Section 15 of the Interstate Commerce Act as amended by the Transportation Act of 1920 [41 Stat. 474].

The New England railroads who submit this brief intervened in the proceeding before the District Court. They comprise the six principal railroad lines operating in New England. The Bangor & Aroostook Railroad, a complainant before the Interstate Commerce Commission, received no increase in its divisions under the order attacked and therefore did not join in the intervention. Other than the Bangor & Aroostook the only railroad lines in New England which did not join in the intervention are a branch of the Canadian Pacific and a branch of the Grand Trunk which have no divisions to consider, and the Boston & Albany Railroad, which is leased to the New York Central, one of the Trunk Lines, and a respondent before the Commission.

The respondents before the Commission included every railroad in the country, with which the New England Roads interchange any freight traffic on joint rates, or which might be affected by an order changing the divisions of joint rates. Only a few of those respondents joined in the petition herein, and we call particular attention to the fact that many of the most important connections of the New England Roads, for example, the New York

Central, the Pennsylvania and the Baltimore & Ohio, among others, have acquiesced in the Commission's order and have refused to join in this proceeding.

The original complaint was filed with the Commission August 8, 1920, and was amended November 16, 1920 (Rec. pp. 14 and 29). Hearings were had before the Commission and proof was submitted at various dates between December 15, 1920, and April 7, 1921. On July 6, 1921, the Commission filed a report declining to increase the divisions of the complainants, but ordering the parties to proceed individually to readjust their entire divisional structure (Rec. pp. 45–109). On October 26, 1921, after it had become obvious that the previous order would accomplish at most only a partial and delayed adjustment, the complainants filed a petition for reargument, which was granted; and thereafter, on January 30, 1922, the Commission rendered a further report and order granting to the six principal complainants other than the Bangor & Aroostook Railroad an increase of their divisions except on coal, etc., of substantially 15% (Rec. pp. 110–138).

Prior to the passage of the Transportation Act certain increases in freight rates had been granted to the carriers of the country as a whole, known as the Five Per Cent. Increase, the Fifteen Per Cent. Increase and the Twenty-five Per Cent. Increase, and upon the passage of the Transportation Act a proceeding before the Commission known as *Ex parte 74* was instituted, under which the Commission in accordance with the provisions of the Transportation Act established the Eastern Rate Group, comprising in general terms all railroads between the Canadian

border on the north, the Virginia gateways on the south, the Mississippi River on the west and the Atlantic coastline on the east, and including all of the New England Lines, and in such Eastern Rate Group authorized increases in freight rates to the extent of 40% and upon passenger fares and certain other revenues an increase of 20%. The Eastern Rate Group so established was practically identical with what had theretofore been known as Official Classification Territory, comprising three subregions known as Central Freight Association, Trunk Line, and New England, separated respectively by a line from Buffalo to Pittsburg and by the Hudson River.

The pressing need of additional revenue for the New England railroads was evident immediately upon the return of the roads by the Government. During the preparation for and hearing of the rate increase case, known as *Ex parte 74*, the matter was discussed on several occasions. At a meeting on April 7, 1920, between members of the Interstate Commerce Commission and representatives of certain of the roads, the case for the New England Roads was presented by Mr. Campbell of the New Haven. At the request of Chairman Clark, Mr. Campbell embodied his presentation in a letter to the Chairman dated April 10, which was introduced into this case as Choate Exhibit No. 1. In this letter Mr. Campbell said among other things:

> "During the discussion at Washington, Commissioner Hall raised the point as to whether an average percentage increase for Official Classification territory would meet the needs of the New England carriers, to which reply

was made that it would not, but that the New England carriers were anticipating that a way might be found for passing to them the difference or *pro rata* proportion of the difference between their requirements and the amount derivable from an average percentage increase. This, it is believed, could be done either by increasing the 'divisions' of the New England roads on traffic interchanged with their connections at the boundary points sufficiently to take up the amount, or by establishing a terminal or 'arbitrary' charge to be deducted before dividing the through rate. The accountants of the New England roads are now engaged in developing a plan for presentation to the Commission covering this point.

"Assuming that an average percentage increase will be granted for the Eastern territory as a whole, and computed by inclusion of the New England roads' requirements, there would be, roughly estimated, approximately $20,000,000 to be passed to the New England Lines."

Mr. Campbell wrote a similar letter to Mr. Ingalls, vice-president of the New York Central, on April 14 (Rec. p. 748).

On May 9, Mr. Pearson, President of the New Haven, wrote a letter to the various members of the conference of Eastern Presidents in which he discussed the necessity for an increase of divisions of through rates to the New England Roads (Exh. 204). Among other things he said:

"The object of this presentation is to secure from the Trunk Line and interested Canadian carriers an understanding relative to the basis and method of distribution of the increase which the carriers in Official Classification

Territory receive under the provisions of the Transportation Act.

"Two alternative methods of accomplishing this result are:

"*First:* That the amount contributed by the New England lines be recovered through the medium of increased divisions. . . .

"*Second:* A proper distribution of the amount contributed by the New England lines by means of a pool under Sec. 407 of the Transportation Act. . . ."

During the representation of *Ex parte 74* the New England Roads filed a supplementary petition which is found in Volume I of the record of *Ex parte 74*. We quote from this petition:

"The amount necessary to give the 6 per cent return on the aggregate property investment of the carriers parties to this statement is given due consideration and included in the exhibits filed with the main statement, to which this is a supplement, but that a substantial portion of that sum, to wit, approximately $25,000,000, will not accrue to the New England carriers parties to this statement, but will accrue to other carriers in Official Classification territory, and also to carriers in Canada.

"The petitioners here do respectfully propose that this Commission give consideration to the manner in which adequate revenues shall be obtained for the carriers parties to this statement, and what relief may be necessary to enable them to provide adequate transportation facilities to the territory by them served" (Rec. p. 190).

This petition, dated May 3, 1920, was presented and signed by the seven New England carriers who were complainants.

That the Commission was impressed by the necessities of the New England carriers is indicated by the following paragraph from their opinion in *Ex parte 74* (58 I. C. C. 220, 247):

> "While the New England carriers are included in the eastern group and are subject to the percentage for that group, the evidence as to the disproportionate needs of the New England lines makes it desirable that carriers give careful consideration to the division of joint rates accruing to these lines."

A joint accounting committee of Trunk Lines and New England Roads submitted to the Eastern executives in August, 1920, after the close of the hearings in *Ex parte 74*, but before the decision, an estimate of the needs of the Eastern Group. This estimate was made before the Labor Board award and does not allow for the additional needs due to that award. It indicates that the needs of the New England carriers required an increase in freight rates of 47.41%, while the Trunk Line and C. F. A. carriers required an increase of 27.98%, and the total group required 29.46%. From this it appears that the increase necessary for the group including the New England Lines exceeded that needed by the Trunk and C. F. A. Lines by 1.48% (Exhs. 6, 192). Applying this percentage to the 1919 volume of traffic indicates that the other Eastern Lines will receive $25,000,000 a year more than they would have received if the New England Roads had been made a separate rate group. Mr. Hildum testified that this estimate was subject to some revision, which might reduce the amount to $20,000,000, but there is no question but that the inclusion

of the New England Roads in the Eastern Rate Group greatly benefited the roads west of the Hudson and that by reason of the larger increase granted in freight than in passenger rates the New England Roads, which needed more, actually received less than other roads in Eastern Territory.

Following the suggestion of the Commission indicated above, the New England Lines, then including the Bangor & Aroostook, filed their complaint for increased divisions and showed to the Commission that since the divisions with the petitioners had been established;

(1) The costs of operation on the New England Roads had been relatively very largely increased because of their terminal characteristics; that the New England Lines had a very high relative density of branch lines, stations, switch yards, junctions and a relatively short haul; that the cost of performing service in New England, because of its terminal characteristics and short haul, had relatively increased, while the cost of performing the service of the petitioners, owing to the improvements in heavy loadings, increased motive power and other factors pertaining to the long haul, had relatively decreased; that the New England Lines had a relatively low density of traffic, producing practically only one-third of the number of revenue ton miles per mile of road produced by the lines west of the Hudson River; that the proportion of freight revenue to passenger revenue was much less on the New England Lines than on the lines west of the Hudson River, and that the percentage of increased rates granted by the Commission, namely, 40% on freight and 20% on passenger traffic, supplied

relatively a very much larger amount of revenue to the lines west than it did to the New England Lines;

(2) The standardization of railroad wages brought about during the period of Federal control and by the orders of the Labor Board had tremendously increased the cost of labor to the New England Lines and had relatively increased it very much more than it had increased the cost of labor to the lines west of the Hudson River, both because of the fact that the level of wages generally through New England had before the standardization been lower than the level of wages west of the Hudson and because, owing to the terminal characteristics of the New England Lines, a given expenditure of man power produced relatively a smaller amount of revenue ton miles in transportation;

(3) There had been a much greater relative increase in the cost of fuel needed for the production of power on the New England Lines than upon the lines west of the Hudson, due both to the greater distance of the New England Lines from the coal mines, which prevented them from obtaining their supplies on such favorable terms as to price, car supply, priority of shipment, traffic interruptions, etc., and also to the fact that every increase of freight rates had increased the cost of bringing coal into New England, which increase operated to the benefit of the lines west of the Hudson River and had been paid by the New England Lines;

(4) The establishment of the so-called "per diem" system of charging for car hire had, owing to the terminal characteristics and the poorly balanced traffic of the New England Lines, which

for every five loaded cars received sent out only two loaded cars, imposed a heavy permanent burden on the New England Lines since the establishment of the divisions.

The proof establishing these propositions will be discussed in detail later in this brief. Suffice it to say here that the evidence dealt very fully with each one of the matters referred to and that it showed conditions on each individual road in New England and on each individual road in Trunk Line and C. F. A. Territory with which the complainants had any important interchange of traffic. The data so presented were also summarized for the two groups of carriers in order to aid the Commission to meet in a practical way the practical problem presented to it.

The Commission, an expert administrative body, familiar with the entire situation in a general way through long experience, having been shown the foregoing facts in great detail, and having been further shown that the divisions which the complainants were receiving had been established from twenty-five to fifty years ago, and having been shown the amount of revenue required by the complainants to meet fixed charges and taxes and a fair return, ordered certain of complainants' divisions increased.

I.

COMMISSION IS AUTHORIZED UNDER THE TRANSPORTATION ACT OF 1920 TO PRESCRIBE JUST, REASONABLE AND EQUITABLE DIVISIONS OF JOINT RATES IN ANY RATE GROUP ESTABLISHED UNDER THE AUTHORITY OF SECTION 15*a* (2).

A Brief History of Legislation Authorizing the Commission to Establish or Readjust Divisions.

The Interstate Commerce Act as amended by the Act of June 18, 1910, Chapter 309, Section 12, provided:

> "Whenever the carrier or carriers in obedience to such order of the Commission or otherwise, in respect to joint rates, fares or charges, shall fail to agree among themselves upon the apportionment or division thereof, the Commission may, after hearing, make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order."

The above statute recognized the common-law right that every carrier has, as a condition of performing the transportation duty, to demand and receive such rates that it will earn, under honest, efficient and economical management, an income in excess of its operating expenses, taxes and charges, its depreciation and maintenance, equal to a fair return upon the value of its property held and used in the service of transportation.

Smyth v. *Ames*, 169 U. S. 466, 546, 547.
Simpson v. *Shepard*, 230 U. S. 352, 434.

By the statute above referred to it was made the duty of every common carrier to establish just and reasonable rates for transportation. It is, of course, familiar law that such rates are subject to revision by the Interstate Commerce Commission. Prior to the Transportation Act of 1920, however, the establishing and maintaining of such rates as would afford a reasonable return upon railway property was left wholly to the initiative of the carriers. Neither Congress nor the Commission assumed any responsibility for the solvency of the railroads individually or in groups or as an entire national system. As this Court has said in *Railroad Commission of Wisconsin* v. *C., B. & Q. R.R.* (decided February 27, 1922, 42 S. Ct. 80):

> "The control which Congress through the Interstate Commerce Commission exercised, was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered and the abolition of rebates."

The Transportation Act of 1920 introduced into the legislation controlling the railroads of the United States a fundamentally new policy. Congress, in that statute, determined that the maintenance of an adequate national railway service for the public of the whole nation should thenceforward be the dominant purpose in the regulation of railroads. The purpose of the Act was, as this Court said in the *Wisconsin Case,*

> "to maintain an adequate railway service for the people of the United States."

By the provisions of that Act, in amendment of of Interstate Commerce Act, it was provided by Section 15 (3) that the Commission, either upon complaint or upon its own initiative without complaint, "shall whenever deemed by it to be necessary or desirable *in the public interest* . . . establish . . . joint rates . . . applicable to the transportation of passengers or property . . . *and the divisions of such rates.*" By Section 15*a* (2) the Transportation Act of 1920 provided that in the exercise of its power to establish just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates

> "so that carriers *as a whole* (or *as a whole* in each of such rate groups or territory as the Commission may from time to time designate) will under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal as nearly as may be to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation; provided that the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable and prescribe different rates for different sections of the country."

It will thus be seen that the fundamental purpose of the Act of 1920 was to provide revenue to maintain the railroads of the country *as a whole*, or *as a whole* in such rate groups as the Commission may

from time to time designate. Inasmuch as the rates to be initiated by the Commission were to apply broadly either to the railroads as a whole or to large rate groups to be delimited by the Commission and as the carriers within such groups had varying earning powers, it was obvious that some method must be devised to so deal with the revenue derived from such rates as would enable the carriers *as a whole in each rate group* to earn as nearly as might be a fair return upon the aggregate value of the railway property of such carriers.

Congress, having provided by Section 15*a* for the financial maintenance of the entire national transportation system by directing the Commission to establish rates which would yield a total amount of income sufficient to meet the total needs of the entire system, realized that it had not completed its task. The crux of the problem was how to enable every necessary part of that system to live. For many years prior to the war the discrepancies in earning power between different railroads had been increasing. Operating conditions varied tremendously, due to topographical features, the location of industries and markets, climatic conditions, the differing character of traffic in different regions, varying investments in the different roads, and many other causes. Instead of these discrepancies disappearing with further economic development of the country, they were constantly being accentuated. The war with its tremendous strain upon the transportation and other resources of the nation brought them to a focus in most startling fashion. When Congress set about returning the railroads to their owners in 1920, it had presented

to it a problem of a seriousness and magnitude such as had never before confronted it in connection with the economic and industrial life of the nation.

Obviously no part of the country could be required to go without railroads. Modern developments had made it impossible to revert to conditions of an earlier date. Economic factors also made it necessary that rates over large areas should be maintained on an approximately uniform basis. Uniform rates, however, necessarily result in very great lack of uniformity in railway income, due to the discrepancies referred to above and many others. This, then, was the problem which confronted Congress. It was out of the question to permit all the roads to charge rates so high as to enable those less fortunately situated to live, because the burden upon the public would be unbearable and the more fortunate roads would earn unconscionable returns. It was a simple matter to determine the correct income necessary for the roads as a whole and to adjust rates so that they would yield that income. It was a very difficult matter to distribute that income in such a way that all necessary roads would be able to live from it.

The hearings before the committees of Congress which framed the Transportation Act are replete with echoes of this problem. The debates in Congress and the reports of the committees make it clear that it was the central problem about which the entire controversy over the amendments of the Interstate Commerce Act revolved. Many devices were suggested for its solution. Among those adopted may be mentioned the "recapture clause," providing that roads which earned more

than a certain income should turn over part of the excess to the government to be used as a revolving fund for the aid of the less fortunate roads by way of loans and equipment loans; the provision giving the Interstate Commerce Commission power to fix minimum as well as maximum rates and thus to prevent cut-throat competition and the taking away of traffic from weaker competitors; the increased control of the Commission over car supply and distribution and over the joint use of terminals and other facilities; the control of the Commission over the construction of new lines of road and the abandonment of old and over the future issuing of railroad securities; the provision for permissive pooling of traffic or earnings; the provision for permissive consolidation of the railroads into a limited number of competing systems under the direction of the Commission; and finally the provisions dealing with the divisions of joint freight rates.

Prior to the Transportation Act, the Interstate Commerce Act had left it doubtful whether Congress had ever given to the Interstate Commerce Commission any jurisdiction over the division of joint rates except in so far as such jurisdiction was necessary in order to prevent discriminatory practices. The Commission, by a majority decision, had decided in 1918 (*Morgantown and Kingwood Divisions*, 49 I. C. C. 540) that it had jurisdiction over divisions which had been voluntarily established. This case was not taken to the courts nor was there any judicial determination of the jurisdiction of the Commission over such divisions prior to the taking over of the railroads during the war.

Naturally the question did not arise during Federal control and it was therefore still undetermined when the Transportation Act was being framed.

That statute contains three provisions dealing with divisions, all of them amendments of the Interstate Commerce Act. Section 1, Paragraph 4 makes it the duty of every common carrier to establish joint rates and just, reasonable and equitable divisions thereof. This provision is new in the 1920 statute in so far as it imposes an affirmative duty upon the railroads. Section 15, Paragraph 3 provides that the commission

> "may and it shall whenever deemed by it to be necessary or desirable in the public interest"

establish through routes, joint rates and the divisions thereof. This section is also new in the 1920 statute. And finally Section 15, Paragraph 6 provides that whenever the Commission on complaint or on its own initiative feels that divisions of joint rates are unjust as between participating carriers it *shall* prescribe "just, reasonable and equitable divisions." This jurisdiction is expressly given to the Commission whether the divisions in question were established by it or not, thus settling the doubt that had previously existed as to its jurisdiction. The section further provides that in so determining divisions the Commission shall take into account such factors as efficiency, revenue needs, the importance of the participating carriers and the nature of their services. As we shall show, these provisions are entirely new in the 1920 Act and their purpose was to aid in meeting the problem of the distribution of the total income of the rail-

roads by requiring the Commission to give consideration to the very factors which had resulted in the creation of that problem.

The provisions of the Act of 1920, Section 15 (6), relating to the authority of the Commission over divisions, had their origin in House Bill No. 4378, introduced by Representative Esch June 2, 1919, and Senate Bill No. 2096, introduced by Senator Cummins. The only changes with respect to divisions proposed by these early drafts of bills were to place beyond question the authority of the Commission to determine the reasonable proportion of a joint rate to be received by any carrier participating therein, regardless of whether the joint rate was one voluntarily established by the carriers or resulting from an order of the Commission. The Commission was also given power to award reparation from the date of the filing of the complaint, but there was no broadening of the language of the Act with respect to the matters to be considered by the Commission in determining what should constitute just and reasonable divisions. After the introduction of these bills many hearings were had by the railroad committees of the two Houses. We point out in Appendix A hereto the discussions that then took place with respect to the need for power in the Commission to so distribute the fund which the rate-making power produced as to carry out the purpose of the Congress that carriers *as a whole* throughout the country or throughout each rate group should earn a fair return upon the capital invested. It was insistently pointed out at these hearings that unless power was given to so apportion the income derived from rate

increases and unless weaker roads should have their needs and condition recognized, the purpose of Congress to support in the interest of the public the carriers of the country *as a whole* could not be carried out.

In the course of these discussions the so-called Short Lines presented a provision which was, without important change, embodied in Paragraph 6 of Section 15 of the Transportation Act. That section imposed a duty upon the Commission in the following terms:

> "The Commission *shall* by order prescribe the just, reasonable and equitable divisions thereof to be received by the several carriers . . ."

It has been asserted that the Transportation Act did not make any change in the requirements which the Commission was bound to consider in determining divisions. The argument has been made that the public interest as well as other factors in addition to mileage had been taken into account by the Commission previously. Reference in this connection has been made to the following decisions of the Commission:

> *Star Grain & Lumber Co.* v. *A., T. & S. F. Ry. Co.*, 14 I. C. C. 364.
>
> *Sloss-Sheffield Steel & Iron Co.* v. *L. & N. R.R. Co.*, 35 I. C. C. 460.

It is undoubtedly true that the Commission did not make mileage the only measure in every case prior to the 1920 statute. Nevertheless it is true

that mileage was the chief factor which the Commission relied upon in determining divisions. See

Low-Moor Iron Co. v. *C. & O. Ry. Co.*,
42 I. C. C. 221.

The record before the Commission in the present case is full of references to the fact that mileage was regarded as the chief consideration in the making of the divisions here complained of. This testimony was introduced not only by several of the witnesses for the New England railroads, but it was also brought out on cross examination from practically all of the respondents' traffic witnesses. (See Record, pp. 515, 538–9, 544, 554, 559, 596, 602–3.)

Even in those instances in which the Commission or the railroads took into consideration other factors than mileage in establishing divisions prior to 1920 these other factors were always considered merely in their relation to mileage. For example, if one road performed an expensive and difficult float service or if it had expensive terminals or some unusual facility such as a long bridge or tunnel the extra cost of its service in this connection was recognized in constructive mileage or arbitrary allowances. It is not true, however, that the Commission took into account the public interest as a factor for determining divisions of joint rates, nor did they consider the revenue needs of the participating carriers nor their efficiency nor importance. Even overhead costs were ordinarily not included.

It must be obvious, therefore, that the sixth paragraph of Section 15 as amended by the Transportation Act introduced an entirely new conception

in connection with the jurisdiction of the Commission over divisions. That paragraph expressly requires the Commission to consider in determining divisions the following elements:

> (1) The efficiency with which the carriers are operated.
>
> (2) The amount of revenue required to pay their respective operating expenses, taxes and a fair return on their transportation property.
>
> (3) The importance to the public of the services of the carriers.
>
> (4) Whether any particular carrier is an originating, intermediate or delivering line, and
>
> (5) Any other fact or circumstance which would ordinarily and without regard to the mileage haul entitle one carrier to a greater or less proportion than another carrier of the joint rate.

Mileage which had previously been the great factor was subordinated to considerations vital to the public.

Moreover, this paragraph does not stand alone. It is an integral part of the new scheme of legislation which Congress adopted in 1920. Together with the paragraphs requiring the railroads to establish just divisions and requiring the Commission to initiate just divisions in case the railroads do not do so, it constitutes one part of the new scheme and it established beyond peradventure that by exercising jurisdiction over divisions the Commission is to be enabled to further the fundamental purpose of the new law by permitting all roads which participate in joint traffic to share the proceeds of such traffic in such proportions as may

enable them all to function as a part of the one national transportation system. Section 15*a* provides for raising a fund large enough to support all the roads. Section 15 (6) provides one of the means for distributing this fund in such a way that it will actually go to the support of all the roads.

Construction to be Given to the Provisions Outlined Above.

It is important in construing the duties of the Commission with respect to the adjustment of divisions to have clearly before one the central purpose which Congress has expressed in the 1920 Transportation Act, that is, the maintenance of a national transportation system in the interest of the whole nation. The credit of the carriers as a whole had been much impaired. New railroad securities were difficult to sell; old railroad securities had heavily declined in the market; it was necessary to establish the credit of the carriers upon a firm basis in order to obtain the additional funds necessary for needed improvement and expansion. The plan adopted was to provide for the establishment of such rates to be paid by the public as would ensure a sufficient income to pay costs and a fair return. The public which was to enjoy the transportation service must necessarily bear the cost of conducting that service, and an essential part of that cost was an income sufficient to pay a fair return upon the investment.

By Section 15*a* (5), known as the "Recapture Clause," Congress recited that whereas it was impossible to establish uniform rates upon *competitive*

traffic which will adequately sustain all the carriers engaged in such traffic and indispensable to the communities to which they render the service of transportation without enabling some to receive an income substantially in excess of a fair return, it is hereby declared that any carrier which receives such an income in excess of a fair return shall hold such part of the excess as is hereinafter prescribed as trustee for and pay it to the United States!

By Section 15*a* (10, 11 and 12) the fund so established may be used for loans to carriers to serve the public convenience and necessity and enable the applicant for a loan to meet the transportation needs of the public.

The plan involved the support of the carriers of the country as a whole. It was recognized that *all* localities were dependent upon efficient transportation; that the railroads were *there* where they had been constructed, and that communities had grown up along the lines which were dependent upon the service of the carriers; and that these lines must be maintained. It was of course also recognized that different lines had varying earning power and varying densities of traffic; that some earned more and some earned less; that a given rate would enable one line to pay a fair return on its investment, while the same rate for another line would not enable it to earn its fixed charges. Traffic conditions made this inevitable. But these considerations did not render it the less desirable or necessary to maintain the transportation system of the country as a whole. The railroad lines were the great national highways, essential to the commerce and the convenience of the people and to the national de-

fence, and they *must* be maintained. It was obvious that it would not be practically possible to establish exactly similar rates in all the different sections of the country. But neither was it practicable to establish different and varying rates for each carrier. Neither of these methods would have had a successful result. The Commission was therefore authorized to establish rate groups, presumably comprising carriers in territories where relatively similar conditions of traffic and cost of service obtained. But this refinement of the plan changed the problem not in kind but merely in degree. It reduced the numbers and geographical limits of the carriers to be affected by an established rate to a narrower compass and enabled the Commission to more nearly approximate a rate which would fit the situation of the carriers within such rate group, but it still left the problem of how the carriers as a whole in such rate group should receive rates which should enable them as a whole to earn an aggregate annual net railway operating income equal as nearly as may be to a fair return upon the aggregate value of the railway property of such carriers. Necessarily within each rate group there must be varying degrees of earning power, different degrees of traffic density and varying traffic conditions.

Pooling of revenues and traffic was prohibited except with the approval of the Commission. The problem of applying the aggregate net railway operating income which the Commission was in duty bound to provide for each rate group so that the carriers in that group as a whole might earn a fair return remained to be solved. The importance of this problem had been presented to the Com-

mission by the insistent arguments of the Short Lines, and it was as a direct result of such insistence that the provisions of Section 15 (6) were adopted.

In approaching the construction of this last-named section certain practical considerations must be dealt with. First, it must be conceded that the Transportation Act of 1920 was an emergency measure. The railroads were to be given back to their private owners; they were showing under Federal control an enormous deficit. Provisions for additional—and a stable additional—income were essential. The pressure of this emergency was clearly reflected in the Commission's decision in *Ex parte 74*. The Commission there said (p. 255):

> "In view of the existing situation it is important that the increased rates be made effective at as early a date as practicable."

The same imperative need of the carriers was noted by the Commission in the Intrastate Rates cases, 59 I. C. C. 290, and 59 I. C. C. 350, the Commission saying in the first of these cases (p. 294):

> "The needs of these interstate carriers for revenue to enable them to provide adequate transportation service and facilities are immediate and, in the interest of the public, cannot be permitted to await the consideration in detail of individual fares, charges, and rates."

This case was sustained by this Court on February 27, 1922 (*New York* v. *U. S.*, 42 S. Ct. 239). In the *Wisconsin Case* decided the same day, this Court cited several of its own decisions and those of other courts approving the practice of general rate orders, saying "any rule which would require specific proof

of discrimination as to each fare or rate and its effect would completely block the remedial purpose of the statute [Act of 1920]."

It was made plain by the New England carriers during the progress of *Ex parte 74* that an average rate increase for the Eastern Rate Group would not meet the conditions with which the New England Lines were confronted, and we venture to suggest that it would have been quite within the power of the Commission to have made it a condition of its decision in *Ex parte 74* that such concessions in divisions to New England Lines should have been made as would have placed those lines upon an equality as to earnings with the rest of the rate group. In fact, on page 247 of that decision the Commission did point out that "the disproportionate needs of the New England Lines makes it desirable that the carriers give careful consideration to the divisions of joint rates accruing to these lines." This, as the record in the present case shows, the respondents have been totally unwilling to do.

The Commission held in *Ex parte 74* that the establishment of rates which would yield 6% was "an administrative task" (58 I. C. C. 226). New England does not comprise an unimportant section of the Eastern Rate Group. The lines in New England serve a large and very important section of that rate group, whose relations with the rest of the rate group are close and intimate, and between the New England Territory and Trunk Line and C. F. A. Territory is a very large exchange of traffic. The divisions between the New England carriers and their connections are, as the Commission has said, "myriad." An examination of these

divisions one by one must necessarily take a vast amount of time and involve a very great amount of research, the examination of evidence at length and in detail, as well as a vast amount of conference and argument.

The aggregate annual net railway operating income for the Eastern Rate Group has been provided for and the public has been and is paying it, but the carriers in the Eastern Rate Group as a whole have not been and are not receiving it. It may well be said that no method of determining what that "annual aggregate net railway operating income" should be could be devised without taking into account the needs of all the carriers in the rate group. The method pursued by the Commission was the only method that could have been adopted to ascertain what aggregate annual income would equal a fair rate. There had to be an averaging of revenue needs to arrive at an aggregate annual income for the rate group as a whole. When that average was arrived at it reflected the peculiar needs of the New England Lines and the increase granted was made greater by such reflection of the needs of New England Lines. When confronted with the problem of how the fund provided by the rate increase can be made to serve the purpose for which the Congress intended it, it is well to look at the language of the sections dealing with the subject matter to see if the Commission is precluded from so distributing or applying that fund as to accomplish the main purpose of the legislation. We repeat, the purpose of the legislation was through the establishment of rates to accrue a fund which would enable the carriers in the Eastern Rate Group

as a whole to earn a fair return. Can the words "as a whole" be properly interpreted to mean "in part only"? It is not necessary to contend that "as a whole" is equivalent to the inclusion of every single mile of road, but the words should be given their natural and ordinary meaning, which must be that the essential carriers as a whole without important exception should have established for them rates and divisions which will enable them as a whole without important exception to earn a fair return. If the establishment of the rates was "an administrative task" the adjustment of the divisions of the rates so that the group as a whole can serve the public must be no less "an administrative task." The mandate of Congress is directed to the Commission. It is not merely to sit in judgment on the contentions of the parties; it is to administer the fund.

In scrutinizing the language of the statute a comparison of the words used in Section 15*a* (2) with the words used in Section 15 (6), we submit, does not admit of any such interpretation as the Commission first adopted. Section 15*a* (2) provides that the Commission shall establish such rates that carriers as a whole or as a whole in each rate group may earn, etc. Section 15 (6) provides that "the Commission shall . . . prescribe the just, reasonable and equitable divisions thereof" (*i.e.*, the joint rates) "to be received by the several carriers." The language is now plural, not singular as in the Act of 1910. In other words, the Commission was given the same scope of authority over divisions that it was given over rates and in addition a duty was imposed to initiate divisions if need be.

It is conceded that the Commission has power

to raise rates "as a whole" throughout a rate group, and the Commission has done so. Why has it that power? In order that the roads "as a whole" in that rate group should pay operating expenses and a fair return on the investment. Does this mean that the public may be taxed so that only a *part* of the roads shall pay expenses and a fair return? It certainly does not. The public is entitled to get what it has paid for. While the Act contemplated that some roads might get more than a fair return,—and in that case provided for recapture,—the Act did not contemplate that some roads should get much less. The tax is levied that the roads "as a whole" should receive a fair return,—and "as a whole" is not synonymous with "in part."

Where there are inequalities there must be redistribution. The raising of the rates was to meet a pressing emergency. But this pressing emergency is only half met if the Act be so construed that no practical distribution of the emergency fund can be made. The public is paying into the emergency fund every day, but the roads that need the money are not getting it.

It is well to look briefly at the manner in which the Commission has dealt with this question in some of the cases involving general increases in rates. In one of the earlier cases,

> *Advances in Rates—Eastern Case*, 20 I. C. C. 243,

the Commission, while declining the carriers' application, went exhaustively into the question of the necessity for a general increase in rates, appearing to find no obstacle in the impossibility of con-

sidering the measure of individual rates. The following significant language appears in the report:

> "While the authority of this Commission only extends to the passing upon the reasonableness of the rate presented for its consideration, it is not confined to single rates. Any number of rates may be embraced in the same complaint, and the duty of the Commission is to consider and pass upon all those so presented. When, as here, there is involved the propriety of advances which affect the entire rate fabric within this territory, embracing one-half the tonnage and one-half the freight revenues of this whole country, and when that advance is justified mainly upon the ground, not of commercial conditions, but by lack of adequate revenue upon the present rate basis, this Commission must determine the fundamental question" (248).

At about the same time there came before the Commission the question of continuing in effect certain general advances which had been made in the class and commodity rates from St. Louis to Texas common points (*Railroad Commission of Texas* v. *Atchison, Topeka & Santa Fe*, 20 I. C. C. 463). The Commission found that the increases which had been made in the commodity rates might properly remain in effect, and again found no lack of authority to deal with the propriety of the increases as a whole, regardless of the reasonableness of specific rates. The following appears in the report:

> "With one or two exceptions no witness was called to testify as to the reasonableness of any particular rate that went into effect on August

10, 1908. As a matter of fact it was announced by the Commission at the first hearing that the reasonableness of individual rates would not be looked into upon this complaint. Stated generally, then, the question before us is whether the net earnings of the defendants upon their several properties were such as to justify them in securing an increase of revenue by readjusting their rates on a higher level. As an incident to this general issue is the related question, strongly urged upon our attention by the complainant, whether, assuming that further revenues were reasonably required in order to yield the defendants just returns on the value of their investments, the defendants could properly increase their earnings, with that end in view, by putting the burden upon a small part of their traffic instead of spreading it more widely over their whole traffic. The defendants took the position, on the other hand, that when rate advances covering as much as 50 per cent. of the traffic are challenged as being unjust and unreasonable, and the defense is that additional revenue is required in order to earn a reasonable return on the investment, the allegation of unreasonableness is met if that defense is established" (468).

"After a careful consideration of the whole record, and having in mind the public interest, the interests of shippers, and also the interests more particularly of such of the defendants as draw their revenues largely if not entirely from the rates here involved, we have reached the conclusion, all things being considered, that no grounds have been shown or have been disclosed by our own investigations for making any substantial disturbance in the rate schedules of the defendants that went into effect on

> August 10, 1908. We do not find that they have so increased the revenues of the defendants as to make them extortionate or to yield earnings that are unduly large, as alleged" (484).

In the *Five Per Cent. Case* (31 I. C. C. 351) the Commission approved an increase of 5% in the class and commodity rates in Central Freight Association Territory. Here again the Commission found no difficulty in approving this general increase in rates for that territory, in spite of the fact that the Commission was fully advised by the carriers themselves that the rates resulting from the increase which it authorized would be in no sense just and reasonable. It is particularly interesting to note that while the carriers in Central Freight Association Territory are vigorously contending that the Commission can authorize only such increases in particular New England divisions which are shown to be just, reasonable and equitable, in the *Five Per Cent. Case* these same carriers were urging a general increase in rates although admitting that the resulting rates would not be just and reasonable. The following language in the report is interesting in this connection:

> "The attitude of the officials of the roads operating in central freight association territory, as disclosed on the record, indicated that they joined in this proceeding not because they thought the so-called 5 per cent increase of rates would meet their requirements or that this form of relief is appropriate in central freight association territory, but only because of the desire of other and more powerful lines operating in trunk-line territory to present to

us in this proceeding one general plan of relief. These officials, while stating that the so-called 5 per cent increase would add substantially to their revenues, expressly condemn the present basis of rates as unsuitable and unsatisfactory. The leading railroad witness on the question affirmed, with some earnestness, that 'the class rates do not sustain any logical relation to each other,' and that under the present basis of rates 'certain shippers of certain classes of freight have not for years borne their share of the burden of transportation,' and in addition to the rates being extremely low they are unscientific and illogical" (402).

"Counsel who presented and argued the case for the central freight association lines admitted and definitely stated that while the 5 per cent increase would help the financial situation, the whole rate structure in that territory needed a readjustment; that many of the lines in the territory would not survive without 'an overhauling of their rates,' and 'could not serve the public as they should until those rates are readjusted and brought upon some logical basis' " (403).

In the dissenting opinion of Commissioner Daniels in the *Five Per Cent. Case* the power of the Commission to deal with rates as a whole rather than individually, and to approve general increases regardless of the propriety of the individual rates, is admirably stated at pages 448 and 449 of the report:

"The first observation to be made upon this section of the act is that the law can not be presumed to require the impossible. When 22,000 tariffs are presented, involving literally millions of specific increases, it is physically

impossible to canvass each specific rate advanced. Where considerations apply generally to tariffs in their entirety and approximately with the same force to each part thereof the law warrants the Commission in passing upon the propriety of the tariffs en bloc. To construe the law to the contrary would nullify it and reduce the Commission to a state of administrative paralysis.

In the second place, it is clear that evidence of inadequate returns upon the fair value of property devoted to the public use is prima facie a showing that present rates are unduly low, and that rates higher than those current are presumably just and reasonable. To this extent revenue evidence is rate evidence; and revenue evidence applying to rates in their totality is rate evidence which applies to each specific rate.

The contention that the Commission may not pass upon rates as a whole, but that it is obliged under the law to consider and to pass separately upon each particular rate between every two points, is expressly and explicitly repudiated."*

This principle, having become so well established, is referred to but briefly in the subsequent proceedings involving general increases in rates (*Fifteen Per Cent. Case*, 45 I. C. C. 303; *Increased Rates, 1920*, 58 I. C. C. 220), but the fact that the Commission authorized increases of 15% and 40% respectively, in those cases, while pointing out that approved relationships would thereby be disrupted,

*The following notation appears in the report in connection with the above statement:

"NOTE.—It ought to be said, however, that what is above stated as to the burden of proof and the authority of the Commission to pass upon rates as a whole does not imply that these views are opposed to those of the majority."

indicates its settled conviction that general increases should be permitted when shown to be merited, even in the face of knowledge that the resulting rates would not conform to the statutory standard of "just and reasonable."

Not only has the Commission increased rates by blanket orders, but it has used the same method to decrease rates. It has reduced rates in broad group proceedings by a consideration of typical conditions throughout the entire region involved in the reduction. (See *Rates on Grain, etc.*, 64 I. C. C. 85; *Reduced Rates, 1922*, 68 I. C. C. 676.)

The method of procedure adopted by the Commission in these blanket rate cases has often been to consider certain roads or certain rates as typical of all the roads or rates affected. For example, in *Advances in Rates Case, Eastern District*, supra, the Commission decided that whatever would be reasonable for the New York Central, the Pennsylvania and the Baltimore & Ohio should be regarded as reasonable for all roads in that district because in the light of its investigation of the case it concluded that they were typical of the district and that rates which would be reasonable on the basis of conditions on those three roads would be reasonable for the entire district.

In the *Wisconsin Case* referred to above this Court upheld the blanket order of the Commission dealing with intrastate rates on the ground that the Commission's report and findings showed that there was an undue discrimination

> "in typical instances numerous enough to justify a general finding against a large class of fares."

The Court refers to several decisions of the Interstate Commerce Commission and the Federal courts, including this Court, in which blanket orders had been sustained. It is thus apparent that this Court has sanctioned the principle of blanket dealing with rates. Any individual case of injustice is taken care of by permitting the Commission to deal with it on its individual merits.

The history of these blanket rate cases makes it clear that the Transportation Act did not create the power in the Commission to deal with rates in groups. Section 15*a* in 1920 first introduces the language relative to sustaining the carriers "as a whole," which has been called by this Court the "chief purpose" of the Transportation Act, but even before that enactment the Commission under its general jurisdiction over rates had exercised, and this Court had approved the exercise of, blanket jurisdiction. (See Interstate Commerce Commission decisions, *supra* pp. 29 to 35, and cases cited in *Wisconsin Case*.) Section 15*a* merely made it mandatory upon the Commission to deal with rates in groups and with carriers as a whole in rate groups.

The Transportation Act, as we have shown above, greatly enlarged the Commission's jurisdiction over divisions. It gave the Commission as broad jurisdiction over divisions as that body had over rates prior to 1920. The "dovetail relation" of the various parts of the 1920 Act and the purpose which Congress had in mind in passing that Act make it clear that the Commission's present jurisdiction over divisions is, if anything, larger than its previous jurisdiction over rates.

This blanket jurisdiction must of course exist

whether the question is as to the power of the Commission to deal with one or more of the divisions of a particular joint rate without at the same time fixing every one of its divisions, or whether the question is as to the Commission's power to deal with the divisions of all the joint rates between two carriers or between two groups of carriers without taking into consideration every single joint rate. Even the appellants have not claimed that the Commission must look at every individual joint rate and their chief traffic witness before the Commission admitted that as a practical matter a division structure must be considered as a whole (Rec. pp. 508–9). If the Interstate Commerce Commission is to function successfully as an administrative tribunal, it is absolutely essential that it have discretion to determine how much detail it shall consider in order to make a proper order concerning rates or divisions or other regulations.

The Commission, since the 1920 Act, has on several occasions by blanket order changed all the divisions of a carrier without considering each individual joint rate and without considering the particular division to be received by each of the participating carriers.

Pittsburg & West Virginia Ry. v. *Pittsburg & Lake Erie R.R.*, 61 I. C. C. 272.

East Jersey R.R. & Terminal Co. v. *Central R.R. of New Jersey*, 63 I. C. C. 80.

Divisions of Missouri & No. Ark. R.R. Co., 68 I. C. C. 47.

In the first of these cases the Commission increased the divisions of the complainant

> "leaving defendants collectively to divide as may seem to them proper what is left of the joint rate after complainants have received their division" (p. 285).

In the second case, at page 85, the Commission, having increased the complainants' divisions, said:

> "We further find that the just, reasonable and equitable divisions to be received by the several other carriers participating in the joint rates would have been, are, and for the future will be the amounts remaining of the joint rates over and above the divisions so to be received by the complainant, to be divided among them as they may agree, or, failing such agreement, as may be determined by us upon application therefor."

The same practice was followed by the Commission in the proceeding in which the order here in issue was made. After establishing the divisions for the complainants by ordering an increase of 15% the Commission prescribed that the divisions to be received by the other participating carriers should be the remainder of the joint rates

> "to be divided among them as they may agree, or, failing such agreement, as may be determined by us upon application therefor" (Rec. p. 120).

In the *Missouri & North Arkansas Case*, supra, the Commission said (p. 61), "It is not practicable for us to prescribe proper specific divisions for each of the multitudinous rates involved." Nevertheless a blanket order was entered prescribing changes to be made in divisions received by complainant on traffic interchanged with each one of its connections.

The thing to be performed by the Commission under the new Transportation Act is not the nice judicial adjustment of divisions of through rates between particular carriers so that the respective divisions may reflect exactly the service rendered by each carrier, but a broad administrative duty to so adjust them that the group as a whole may serve the public. The purpose which the Act sought to accomplish was to provide the amount of revenue required by the participating carriers as a whole to pay their respective expenses, taxes and a fair return. One cannot escape the plain direction of Congress to the Commission that the element of fair return upon the investment was the central feature of the Transportation Act and that fair return was to be brought about by two things, namely, the establishment of rates and the establishment of divisions which would distribute those rates in accordance with the plan that Congress had adopted. For with reference to what standard were the rates to be established? Why, with reference to the standard necessary to yield a fair return on the investment. But were not the divisions to be established with reference to the same standard? Section 15 (6) was as mandatory upon the Commission to fix the *divisions* with respect to fair return as Section 15*a* (2) was mandatory upon the Commission to fix the *rates* with reference to fair return. These two parts of the machinery provided by the Act to rehabilitate the railroads must operate together, and they cannot be made to operate together unless the Commission deals with divisions as it deals with rates, namely, in a broad and comprehensive fashion so that the in-

creased fund paid by the public to provide an aggregate annual return for the rate group as a whole shall be distributed through the branches that form that rate group so that all the branches of the tree may live and contribute to the prosperity of the whole. The nourishment for the transportation tree which is drawn up through the trunk like sap must be permitted to find its way into the branches or the tree as a whole cannot flourish; and this was the purpose of the plan, and the only method by which this nourishment can be supplied is through the agency of divisions which will recognize the necessity of a fair return for the different branches and this fair return through the machinery of adjusted divisions can only be attained by dealing with divisions broadly.

It has been asserted that to change divisions as the Commission has done here is to take away the property of one carrier and give it to another without due process of law and without just compensation. But whose property? The joint rate constitutes a joint fund. It is held by the participating carriers as a sort of trust fund to be distributed according to the direction of the Commission in such a way as to accomplish the purpose for which it was charged. No one carrier owns any part of it until the final distribution is made. It is joint property, held for all the participants jointly and charged with a public interest until such time as it is assigned to those carriers who are ultimately entitled to it.

The Commission may change rates without depriving either carriers or shippers of property without due process. By exactly the same reasoning

a carrier is not wrongfully deprived of its property if its share of a joint rate is changed. The issue in the case of divisions is between two carriers. The issue in the case of rates is between a carrier and a shipper. The question of constitutional protection of property rights is exactly the same in each case. If the Commission can increase rates by a blanket order, a proceeding which necessarily affects shippers, if it can decrease rates by a blanket order, a proceeding which necessarily affects carriers, then certainly it can change the division of rates by a blanket order.

There can be no sound and logical reason why the principle thus accepted by the Commission of dealing with divisions by a blanket order should be denied application to the New England Roads so far as the evidence in the case shows that the respective New England Roads are participants in joint rates, provided of course the record shows that they have established their case,—and this we hereafter discuss. But if it is a sound proposition, as the Commission has in the cases cited above decided, that the divisions as a whole between one carrier and its connections may be revised in one decision, there can be no logical point at which the Commission can refuse to extend this principle to seven carriers who join in one petition. That it was logical that the carriers in this case should unite in their petitions seems to have been recognized by the Commission in *Ex parte 74*. On page 224 of the decision in that case the Commission said:

> "But the carriers in New England and in the Southwest have brought to our attention the

> peculiar financial needs of the railroads in those territories."

And on page 247:

> "While the New England carriers are included in the Eastern group and are subjected to the percentage for that group, the evidence as to the disproportionate needs of the New England lines makes it desirable that the carriers give careful consideration to the divisions of joint rates accruing to these lines."

It has been objected that the order of the Commission deals with the divisions of joint rates only between the New England carriers on the one hand and the carriers outside of New England on the other and not between each individual participating carrier where there were more than two carriers involved in the through route. As we have pointed out above, it is not necessary that the Commission deal with each individual division of a joint rate. The science of rate-making is familiar with the conception of primary divisions of joint rates. Where a through route is established between two different regions the usual practice is to think of the gateway between the regions as constituting the most important dividing point of the rate. For example, on transcontinental traffic Chicago or the Mississippi River gateway is the point at which the rate divides in the first instance. How the two main parts of the rate are to be subdivided among the various carriers east or west of the primary gateway is an entirely separate question from how the total rate shall be divided as between the two main territories. The Interstate Commerce Commission has for some time recognized the Mississippi gateways and Chicago as primary dividing points. Divisions

on transcontinental traffic are always thought of in terms of the east-of-Chicago or the west-of-Chicago portions. In the same way, rates on traffic between Southern points and the Eastern Rate Group are primarily divided at the Virginia or Ohio River gateways, the lines north in most instances receiving what are called specifics to be divided among themselves as they see fit, while the Southern carriers receive the balance of the joint rate and distribute it among themselves as they wish.

There are several reasons for this conception of primary dividing points in connection with through routes. The railroads of the country naturally fall into territorial groups. This is the result of various causes, such as the accident of historical growth, differences in geographical conditions, the location of raw materials, industries and markets.

These natural groups have long been recognized by the Commission for rate-making purposes. Prior to 1920 the country was roughly divided into three main groups, the Western, the Southern and what was known as Official Classification Territory.

Under Section 15*a* of the Transportation Act the Commission is empowered to establish groups for rate-making purposes and under this power in *Ex parte 74* it established four main groups, to wit, the Eastern Group corresponding to Official Classification Territory; the Southern Group corresponding to Southern Territory; the Western Group comprising that part of Western Territory between the Mississippi River and a north and south line located somewhat east of the Rocky Mountains; and the Mountain-Pacific Group comprising the balance of Western Territory. Each of these groups was treated

differently with regard to the amount of rate increase permitted therein by the Commission in *Ex parte 74*. With regard to freight rates the carriers in the Eastern Group were permitted an increase of 40%, those in the Southern Group and Mountain-Pacific Group 25% and those in the Western Group 35%. Interterritorial rates were permitted to be increased 33 1/3%. It will thus be seen that the Commission itself in *Ex parte 74* dealt with joint rates within a single rate group in a different way from that in which it dealt with inter-group joint rates. This, in itself, recognizes a difference between dividing points between groups and dividing points within groups.

Within the Eastern Rate Group or Official Classification Territory there have long been recognized to exist three sub-groups,—New England, Trunk Line and Central Freight Association Territory. Lake Champlain and the Hudson River constitute roughly the boundary of the New England region, while a line from Buffalo to Pittsburg and Charleston, W. Va., divides Trunk Line from C. F. A. Territory.

The Commission always deals with these subgroups. Even prior to the 1920 statute it had established separate rate scales for C. F. A. Territory and for New England. (*C. F. A. Class Scale Case*, 45 I. C. C. 254; *Proposed Increases in New England*, 49 I. C. C. 421.) In the Commission's tabulations and statistics these three subdivisions are always recognized. Very often other subdivisions are also recognized by the Commission, such as the Great Lakes region, the Ohio-Indiana-Alleghany region, the Pocahontas region and others, but always

the New England region is considered separately as a group. As Professor Cunningham testified (Rec. p. 381): "New England is a separate section of the country. From the beginning of the Interstate Commerce Commission classification, Group 1 was New England. The east of the Hudson River has been regarded as an integral rate and railroad territory, as well as—well, in every respect, economic, social and transportation. New England has been considered as a sort of unit."

The reasons for this are not far to seek. The character of traffic in New England on the whole is different from that in the neighboring territory. The record before the Commission furnishes countless illustrations of this, and no attempt was made to controvert it on the part of the respondents. In fact, Mr. Alfred of the Pere Marquette expressly stated it (Rec. pp. 639-59). The character of the industries and their age and distribution in New England are unlike those in other parts of the Eastern Territory. Geographical considerations also contribute to this result and the mere accident of historical growth has had an important bearing.

Lake Champlain and the Hudson River mark the western terminus of all the New England railroads (except one or two that do not extend so far west and except for one small branch of the Rutland). These same geographical features mark the easternmost limit of the Trunk Lines. Except for the Boston & Albany, which is now a subsidiary of the New York Central, and except for one or two subsidiaries of Canadian lines, there are no railroads operating in New England other than the so-called New England Roads.

For these various reasons New England has always been regarded from every point of view as a separate unit for railroading purposes. If a through route was to be put in between a New England point and a Western point, it was done by agreement between a New England road and some Western road involved. For example, if the New Haven road desired to establish a joint rate between New Haven and Chicago it could do so by way of the Pennsylvania or the New York Central or various other routes. Some of these routes involved a single carrier west of the Hudson; others involved two or more carriers. It made no difference to the New Haven how many carriers participated, but the routes and rates were established on the basis of those already in existence in connection with other carriers. How the carriers between the Hudson and Chicago distributed that part of the rate which did not accrue to the New Haven was of no interest to the New Haven and was not involved in the negotiations between the New Haven and its Trunk Line connection.

The testimony before the Interstate Commerce Commission shows that this is the way in which the divisions in question grew up. The New Haven and the Pennsylvania established through routes and joint rates in the early seventies and agreed between themselves how those joint rates should be divided (Rec. pp. 361-2, 505-6). Later the Baltimore & Ohio desired to participate in New England traffic to and from B. & O. points in the same territory in which the Pennsylvania had already established joint rates. The New Haven agreed to establish joint rates with the Baltimore & Ohio and both the

rates and the divisions were made on the same basis as those between the New Haven and the Pennsylvania. This was not done for any other reason than the exigencies of competition. The Baltimore & Ohio had no point of direct interchange with the New Haven. An intermediate carrier was necessarily involved. The Baltimore & Ohio, in order to secure the traffic, had to allow to that intermediate carrier a certain portion of its share of the joint rate. What arrangements were made between the Baltimore & Ohio and the intermediate carrier were no affair of the New Haven's. The primary division of the rate was again as in the case of the New Haven and the Pennsylvania at the New Haven's western gateway (Rec. pp. 362, 550). This same process was repeated between the New Haven and each one of the other Trunk Lines which desired to establish joint rates with the New Haven (Rec. pp. 362–4, 522, 540, 559, 597–9). In like manner, joint rates were established between the Boston & Maine and its Western connections (Rec. pp. 264–6, 269), the primary dividing point in each case being the Boston & Maine's western gateway. The distribution of the western portion of the joint rate as among the participating carriers, if there were more than one, was of no interest to the Boston & Maine. The fact that at the time the majority of the divisions which now exist were established the present New England systems consisted of several small roads each does not change the force of this historical argument. The small New England roads divided the New England share of the rate among themselves if more than one of them participated in the traffic. The primary divisions in every case were based upon the Hudson

River gateways. As these small New England roads were gradually consolidated into the present New England systems, their established rates and divisions were taken over by the resulting systems (Rec. pp. 265–6).

The New England railroads have for a long time worked in close relation to each other on traffic and operating matters. For example, as the testimony before the Commission showed, the New Haven and the Boston & Maine divide joint rates on traffic which passes over both of their lines on the basis of what are known as road-to-road per cents. They do not divide each individual rate on a percentage of its own, but they lump all their interchanged traffic and in that way determine the proportion of the revenue from it to be received by each road and then allow to each road that proportion of every joint rate.

To argue that because only the primary divisions of joint rates on traffic between New England and outside points were complained of in the proceeding before the Interstate Commerce Commission the Commission therefore had no jurisdiction to consider the joint rates or any of their divisions, is to urge the adoption of a method of procedure before an administrative tribunal which would make impossible any successful general administration of this very difficult problem. If the Commission could consider divisions of joint rates only where every single division was put in issue, the amount of investigation involved in any division case would be so tremendous as to make a determination of such a case impossible. The New England Roads complained of the primary divisions only. They did not raise

the question of the subdivisions either outside of or within New England. If the respondents before the Commission objected to the subdivisions east or west of the Hudson, they had their day in court before the Commission and could have stated their objection and supported it with evidence. They should not at this time be permitted to assert that the Commission cannot determine the primary divisions merely because all of the subdivisions were not in evidence and were not complained of.

Finally, there is a most important practical consideration which bears strongly upon the construction to be given to the provisions of the Transportation Act. We have pointed out that the rate increase imposed upon the public which is dependent upon the Eastern Rate Group for its transportation includes and reflects the financial needs of the New England carriers, that is, the amount of revenue necessary to enable them to earn a fair return, and that as a result of the decision in *Ex parte 74* the public is paying and has been paying the increased rates to meet these financial needs, but that that portion of the increased rates made necessary by the financial needs of the New England Roads has not been applied to meet those needs but has gone elsewhere. In other words, the public has paid for what it is not receiving, namely, such increased aid to the New England Roads as to enable them to furnish the transportation service for which the increased rates were imposed. The tax has been imposed upon the public, measured in part by the financial needs of the New England Roads, but the proceeds of the tax have gone elsewhere. It cannot be denied that the operation of averaging the percentage

increases needed by the respective subsections of the Eastern Rate Group has resulted in a rate increase which reflects in part the needs of the New England railroads. And it equally cannot be denied that the increased rate resulting from the inclusion of these financial needs has gone to the benefit of roads other than the New England Roads. This results in a denial to the New England Roads of the application of those considerations which Section 15 (6) makes mandatory upon the Commission, namely, that the amount of revenue required by the New England Roads to show a fair return must be considered by the Commission in establishing divisions. It is a familiar maxim in the administration of justice that to delay justice is to deny justice; and to so interpret the Transportation Act as to indefinitely delay relief through divisions to the New England carriers by requiring the consideration of each of the myriad divisions, item by item, is to so delay the administration of justice in this case as to be equivalent to a denial of it. To require such a course would defeat the purposes of the legislation. As the Commission said in the *East Jersey Case*, the fund raised by the rates is charged with a public interest. It was an administrative duty of the Commission to apportion this fund in a manner to serve the public interest.

The plain purpose of the plan embodied in the legislation is to raise a fund which may be distributed so that the carriers as a whole in the rate group may earn a fair return. Two essential pieces of machinery are provided: one to raise the fund; the other to distribute it to the end that the carriers as a whole without important exceptions

may earn a fair return. Each piece of machinery is as essential as the other to the successful working of the whole machinery provided and each requires administrative action. It clearly was not contemplated by the statute that the result of rate increases would be that no road should earn more than 6%. The very provision for recapture plainly shows that Congress expected certain roads would earn more than 6% under the plan. It must have been equally obvious that other roads would earn much less than 6%. But in determining the rate of return Congress said [15*a*, 3] ". . . it [*i.e.*, The Commission] shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation." There is no provision to remedy this situation except through the readjustment of divisions, and unless the section relating to readjustment of divisions can be made to work as smoothly and as readily and as quickly as the provisions with respect to the increase of rates, the machine must necessarily break down.

It is obvious to any one acquainted with the railroad situation that a uniform rate which will produce an average income of 6% will yield less than zero to a great many roads. The Commission cannot increase the rate of return under the Act beyond a fair return, but the Commission must enable all essential and efficiently managed roads to exist. This is shown very conspicuously by (15*a*, 5), the recapture clause, where the thought relates to

competitive traffic and where divisions would not enter in. The thought was that the Commission would establish rates which would permit competing roads to live if both were essential to the community. *A fortiori*, connecting roads essential to the community must be sustained. The only possible solution is an interpretation of the Act which permits the Commission to decrease the discrepancy in earnings between the strong and the weak roads. This does not mean that the Commission must or should equalize earnings so that all roads will earn the same. It does, however, mean that the Commission has the responsibility of redistributing earnings to whatever extent is necessary in order to enable all the roads to earn a necessary minimum for existence.

There is no provision in the Act, except the divisions provision, under which the Commission can make this redistribution in the case of weak roads which connect with strong ones. The recapture provision in Section 15*a* does not afford relief inasmuch as its purpose is confined to loans to roads which are able to repay promptly and to furnish adequate security, and these loans may not be used for operating expenses, but merely for certain capital accounts.

It has been suggested that the real difficulty with the situation presented by the proceeding before the Interstate Commerce Commission was not that the New England percentages of the joint rates were too small, but that the joint rates themselves were too low. We have shown that the Transportation Act contemplates the raising of a fund in each rate group sufficient to care for the needs of all the

carriers in that group as an aggregate, and that the means of dividing that fund in such a way that it may actually go to the support of all the roads is one of the most difficult and important functions delegated to the Commission by Congress in that Act. Of course there are periods of traffic shortage when the rates established by the Commission are not sufficient to produce a fair return upon the aggregate railway property. Undoubtedly also there are individual rates here and there all over the country which are non-compensatory, and which do not bear their fair proportion of the total traffic burden. With regard to the latter the Commission is always ready to consider applications to remedy them. With regard to the former the Commission as an administrative tribunal must use its best judgment to establish rates at a point where by and large and over periods of traffic shortage as well as periods of excess traffic the rates will yield a fair aggregate amount. In *Ex parte 74* the Commission established rates at a point which in their judgment would allow a fair return in each rate group, leaving the door open for specific investigation of specific rates if any one considered them inadequate. Unless and until the Trunk Lines or some one else attacks particular joint rates into or out of New England on the ground that they are inadequate, it is to be presumed that those rates as established by the Commission in *Ex parte 74* are adequate to bear their fair share of the traffic burden of the Eastern Rate Group. "Rates established in accordance with law are presumed to be just and reasonable." (*Hooker* v. *I. C. C.*, 188 Fed. 242, 252. See also cases cited *infra*, pp. 59, 60.) The prob-

lem before the Commission in the present case was, therefore, not how to increase the total revenue to be received by the carriers, but how to divide the revenue actually received in such a way that it would most nearly accomplish the purpose which Congress had in mind. That is an administrative problem pure and simple and exactly the sort of problem for the solution of which the Interstate Commerce Commission was created.

It has been objected that the divisions provisions of the Transportation Act, if interpreted as the New England Roads urge that they should be interpreted and as the Commission has interpreted them in making the order here in issue, are unconstitutional under the fifth amendment to the United States Constitution because they take private property without just compensation and without due process of law. We have pointed out above that there is no such thing as property in an existing rate as applied to future services. No road has a property right to have its rates remain unchanged. The rates to be charged by the railroads of the United States are within the determination of the Interstate Commerce Commission and this Court has many times recognized the constitutionality of the doctrine that railroad rates may be regulated by law and that Congress may delegate this power to the Interstate Commerce Commission. We cannot conceive that this Court will seriously question the propriety of our contention that Congress or the Interstate Commerce Commission may change the share of joint rates to be received by the participating carriers in exactly the same way in which they may change the rates themselves.

Even if the total amount of the joint rate to be received by the participating carriers jointly for future services can be considered as property vested in those carriers, the 1920 Act, as we have shown, makes it jointly the property of all participating carriers. It does not assign certain proportions of it beforehand to each of those carriers merely because heretofore, whether by agreement or as a result of the Commission's determination, they have received such proportions. Congress has provided that the total fund should be raised and that fund should be distributed for certain purposes. When the rate is established the Commission has taken steps to raise the fund, but that fund is the joint property of all the carriers who participate in the service, held by them jointly, as it were in trust, for the benefit of those to whom the Commission indicates it should go.

A similar suggestion to that referred to above has been made by our opponents when they have said that the doctrine which we advocate amounts to compelling the strong to support the weak. On analysis it will be seen that this generalization amounts to nothing. A road which is financially strong is not being asked to support a road which is financially weak, but the total fund which Congress has declared shall be raised for the support of all the roads whether strong or weak is being distributed as Congress contemplated that it should be, in such a way that it will result in the support of all. No road whether strong or weak has any *a priori* right to receive any specific rate or any specific proportion of a rate. Each road has a right to receive enough to live on, and under the policy

of Congress the Commission must see to it that each efficiently managed road does receive enough to live on. If one road, on account of greater operating handicaps and expenses, requires a larger return for what appears to the shipper to be a similar service, this does not mean that the road whose costs are less is being called upon to support it by granting it larger divisions. It merely means that the Commission in its administrative discretion is paying each road for the contribution made by it in proportion to the costs of that contribution. Assuming efficiency of management on the part of all the participating roads, it is inconceivable that 100 miles of transportation service should cost exactly the same amount in effort and equipment on each road. What the Commission has done in this order and what we maintain Congress intended it should do under the divisions provision is to take into account the differences in the burden borne by the different roads in performing the common service and to recompense the roads in proportion to their respective burdens.

The Interstate Commerce Commission approached the problem presented to it in the *New England Divisions Case* from the point of view of an administrative tribunal using its discretion to meet a very complicated and difficult situation in the most practical manner possible. Immediate catastrophe faced the New England Roads, due to an accumulation of causes beyond their control which, as we shall show, had arisen since the divisions were established. These conditions affected the New England Roads as a group in a different way from that in which they affected the roads outside New

England. To readjust divisions one by one would have taken many years. To readjust the divisions even road by road would have taken many years. The Commission dealt with the problem in exactly the same spirit in which the railroads themselves had faced it during the preparation of the evidence which was submitted to the Commission in *Ex parte 74*. Exhibit 6 introduced by the complainants before the Commission, which is copied from data prepared jointly by all the Eastern Roads for use in *Ex parte 74*, shows that all the roads, not only the New England Lines, but the Trunk and C. F. A. Lines as well, thought of New England as a separate group and appreciated the difficulties confronting it as a group, and that the solution of some part of these difficulties by means of a blanket readjustment of divisions was contemplated even before the decision in *Ex parte 74*.

II.

FACTS PROVED BY THE RECORD WHICH SUSTAIN THE COMMISSION'S ORDER.

AGE OF DIVISIONS.

Present Divisions Established Many Years Ago.

The record shows that the New England Roads interchange on joint rates a very large amount of freight traffic with roads all over this country and Canada. The direct interchange occurs between five New England Roads on the one hand and ten direct Trunk Line connections on the other (not to mention five or six Canadian Roads whose traffic

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is not here involved). The traffic is interchanged at one or another of approximately fifteen different gateways, all of them situated on or near the Hudson River or Lake Champlain or on the line of the Boston & Albany Railroad in New England. Beyond these gateways the traffic spreads out to the west and south over a very large number of carriers. (For a fuller description of this interchanged traffic and the history of the rates applying to it, see *infra*, pp. 101 to 105).

The first joint rates with New England were established in the early seventies (Rec. pp. 505–6). Most of the New England Roads' divisions were established more than thirty-two years ago (Rec. p. 262). They have grown up through the consolidation of a number of separately operated railroads, each of which had its preferred routes and its own basis of divisions, often based on competition. In spite of the changes in the railroad situation the basis of the divisions has remained practically unchanged (Rec. pp. 264–5, 339, 353, 358).

The divisions were based almost entirely on trade, with mileage, actual or constructive, as a basis. Some idea of their antiquity may be derived from information submitted by the New Haven with respect to its divisions. The following table shows the date when the New Haven's divisions to and from Trunk Line Territory were established and the number of years that elapsed between their establishment and the commencement of the proceeding before the Commission (Rec. p. 293):

Connections.	Date Established.	No. of Years to Date of Suit.
P. R.R.	March, 1880	40
P. & R., C. N. J.	January, 1887	33
L. V.	April, 1887	33
B. & O. via P. & R., C. N. J.	April, 1895	25
Erie	February, 1896	24
West Shore	August, 1896	24
D. L. & W.	March, 1902	18
N. Y. C. via B. & A.	March, 1903	17

It is to be Presumed that Divisions in Effect for a Long Period of Years were Fair when Established.

This presumption has been treated by the courts as a well-established presumption of law with respect to rates.

In

Ohio, etc., Smelting & Refining Co. v. *Public Utilities Comn.*, 68 Colorado, 137,

the Court said (at page 155):

> "The sufficiency of the rate prescribed to produce a fair profit upon the value of the property employed in business is to be strongly presumed . . . the presumption must be correspondingly stronger where the rate rests upon the contract between the parties understandingly entered into."

In

Re Searsport Water Company, 118 Maine, 382,

the Court said (at page 393):

> "Such contracts having been voluntarily entered into and the terms and rates agreed upon by all parties in distinction from rates arbitrarily imposed . . . the rates fixed therein are presumed to be reasonable and just until

otherwise determined by the Utilities Commission."

In

Hooker v. *Interstate Commerce Commission*, 188 Fed. 242, at p. 252,

the Court said:

> "All rates established in accordance with law are presumed to be just and reasonable. It is for this reason that the rates for the transportation of freight of other carriers in the same territory may be looked into as evidence for what should be a just and reasonable rate, provided conditions are similar."

The Commission has adopted that presumption as a rule of evidence and has said that where for a long period of time rates have been the same and no complaint has been made in reference thereto the presumption obtains that they are reasonable.

Youngstown Sheet & Tube Co. v. *P. & L. E. Ry.*, 29 I. C. C. 428, at p. 437.

And in

Chicago Switching Charges, 28 I. C. C. 677, at p. 679,

the Commission said:

> "Where a particular rate has been in effect for several years the presumption is that it is a compensatory rate."

The same principle must apply to divisions long established. The District Court in the instant case expressly said, "By this long practice of divisions, the parties, may be presumed to have considered that it was fair when established" (Rec. p. 942).

Since the Hepburn Act in 1906 the Commission has had jurisdiction over divisions in case the carriers disagree. Such jurisdiction was clear in the case of joint rates established by the Commission, and in the

> *Morgantown and Kingwood Case*, 49 I. C. C. 540,

the Commission held that its jurisdiction extended also to joint rates voluntarily established. Ever since 1906 carriers have been able to bring disputes over divisions of voluntary joint rates before the Commission simply by cancelling the joint rate and thus forcing the Commission to re-establish it.

In

> *Pittsburg & West Va. Ry.* v. *Pittsburg & Lake Erie R.R.*, 61 I. C. C. 272, at p. 283,

the Commission assumed that divisions in force in April, 1917, were reasonable, and it made such assumption upon a record where

> "no evidence has been presented indicating the method or principle by which complainants' divisions were determined,"

and where

> "complainants' evidence as to cost of service is not adequate, and even if it were could hardly be used as a measure of divisions in the absence of evidence in regard to the relation of the joint rates to the total cost of the service performed,"

and where

> "the evidence as to the relative amount and character of service performed is also not adequate. . . ."

We therefore submit that where divisions have been established many years ago, and in this case *all* the divisions complained of are prior to the year 1906 and many date back to 1870, and were established by the voluntary agreement of the carriers parties thereto, they must be presumed to have been fair and just when established.

The same rule of evidence which presumes divisions long ago established to have been fair and equitable when established obtains with respect to the compensatory character of a rate. In other words, it must be presumed that the constructive mileage and arbitraries allowed the New England Lines constituted fair allowances when granted and that they reflected the then costs and terminal character of the service performed by the New England Lines.

> See *Chicago Switching Charges*, and other cases cited *supra*, pp. 59, 60.

It is to be presumed that in the rates established by the order of the Commission in *Ex parte 74* the exceptional terminal expenses of the complainants have been reflected. This obviously must have been so from an examination of the method by which the Commission arrived at the 40% increase granted in *Ex parte 74*.

The method adopted by the Commission as disclosed by its decision in *Ex parte 74* was to ascertain the value of all the properties in the Eastern Rate Group. It then determined what sum was necessary to pay 6% on these aggregate values. It determined and added up the actual net earnings of all the properties and deducted those earnings

from the amount needed to pay the 6% return. An increase in freight and passenger rates and other items was then granted, which added to the revenue already shown would give 6% on the aggregate values of the properties. Into this computation the value of the properties of the New England Lines, the earnings of those properties and the deficit in those earnings necessarily entered. The ratio of earnings to property values in New England and the deficit in earnings below 6% necessarily reflected the operating handicaps of the New England Roads. It is thus demonstrated that in the rate increase granted by *Ex parte 74* were reflected the exceptional burdens under which the New England Lines were struggling. We submit that the foregoing demonstrates that it was established by presumption of law that the divisions complained of were fair and equitable when established; that the increased rates reflected the operating handicaps of the New England Roads, at least as far as was compatible with public interest, and in order to be entitled to the relief sought it only remained for the complainants to show that the new and exceptional handicaps from which they suffered had arisen since the divisions were established.

REVENUE NEEDS OF THE RESPECTIVE PARTIES.

New England Roads in General.

The New England Roads, according to the testimony, which was based upon the latest available data, will fall short of earning 6% on their property investment by more than $50,000,000 annually.

They will actually fail to meet fixed charges by over $27,000,000. In fact, their operating income will be a deficit.

The *property investment accounts* (transportation property only) of the seven complainant roads on October 31, 1919, aggregated $838,274,769 (Exh. 1 and Rec. p. 191).

Their *cost of reproduction new plus land* as of the valuation date June 30, 1914, was more than 30% greater than their combined property investment accounts as of the same date (Exh. 2 and Rec. p. 192).

Six per cent. on the book value would be $50,296,485 (Exh. 1); 6% on the reproduction value would be over $65,000,000.

The annual average *net railway operating income* of these roads for the test period was $35,175,077; for the period of Federal control, $4,477,989; for the year ended June 30, 1920, adjusted,* $8,696,666, or 1.04% of the book value (Exh. 1); for the year ended October 31, 1919, adjusted,* $7,498,769, or less than 1% (Exh. 61 revised); actual net railway operating income for the months of September and October, 1920, was $615,600 (Exh. 4). With this should be contrasted the ratio of over 4.5% of net railway operating income to property investment for the adjusted year† ended October 31, 1919, for the Trunk and C. F. A. Lines shown in Hildum's‡ Exhibit 124.

*Revenues and expenses adjusted to represent December, 1920, rates, wages and costs (Rec. pp. 191 and 423).

†Based on reports from 29 carriers, estimating the effect of the wage award, rate increases and all other factors influencing net railway operating income (Rec. p. 670).

‡ Mr. Hildum, comptroller of the Lehigh Valley, was one of the principal operating and revenue witnesses for respondents (Rec. p. 660).

Williams'* Exhibit 145 shows for September, October and November, 1920, the following comparison between the New England Roads (*including* the Boston & Albany, C. P. R. and Grand Trunk) and the other Eastern Roads (Rec. p. 744).

FOR THREE MONTHS ENDED NOVEMBER 30, 1920.

	New England.	Other Eastern.	Total.
Six per cent. on valuation.	$13,796,000	$129,613,000	$143,409,000
Net operating income.....	def. 459,405	93,369,193	92,909,788
Shortage under 6%.....	14,255,405	36,243,807	50,499,212
Rate earned—annual basis	deficit	4.3%	3.9%

The *fixed charges* of these roads for the adjusted year ended June 30, 1920, were $34,783,380. Non-operating income of $7,170,256 reduced this to $27,613,124, as the "net" fixed charges to be met out of operating income (Exh. 3 and Rec. p. 192).

The *deficit below fixed charges* would therefore be for the adjusted year ended June 30, 1920, $18,916,458 (Exh. 3); for the adjusted year ended October 31, 1919, $20,615,410 (Exh. 61 revised); for the year (four months largely actual, balance estimated†) ending August 31, 1921, $27,386,975 (Exh. 62 revised); actual deficit below fixed charges for September and October, 1920, $3,591,183 (Exh. 4).

* Mr. Williams, vice-president of the D. & H. and chairman of the board of directors of the Wabash, was chairman of the Special Committee of Presidents organized to handle this proceeding before the Commission on behalf of all the respondents (Rec. pp. 699, 700).

† This estimate attempts to take into account reduction of tonnage and of costs so as to picture conditions as they will actually exist (Rec. p. 423).

In spite of the increases granted in *Ex parte 74* the freight revenues of the New England Roads have not increased as much as those of the Trunk Line and C. F. A. Roads, as is shown by Mr. Brigham (Rec. p. 628). The percentages of increase in freight revenues for certain roads in September, October and November, 1920, as compared to 1919 are: New Haven, 23.5; B. & M., 24.3; B. & O., 43.5; C. N. J., 40.8; D. & H., 48.7; D., L. & W., 43.9; Erie, 41.6; L. V., 31.1; N. Y. C., 42.6; Penna., 45.9; P. & R., 55.0; P. & L. E., 91.8.

The full benefit of the Anderson Scale has not been realized because of the hold-down of through rates to Trunk Line Territory under the Long-and-Short-Haul clause (Rec. pp. 262-3 and 461). This situation can only be rectified with the co-operation of the Trunk Lines. This may require a complete realignment of interterritorial rates between Trunk Line Territory and New England and will involve a tremendous amount of time and labor, and the approval of the Interstate Commerce Commission (Rec. pp. 460–1). The Trunk and C. F. A. Lines will probably benefit more than the New England Lines from such a realignment, and the latter will not receive enough increase to meet their needs (Rec. p. 884).

It cannot be claimed that the present financial difficulties of the New England Roads are due to an unjustifiable distribution of their assets among their stockholders. As will be shown later, the chief New England Roads have paid no dividends for seven or eight years (Rec. pp. 193 and 296). The loss to the stockholders of the New Haven alone has been about $66,000,000 (Rec. p. 289).

During that period the New Haven and the Boston & Maine have spent approximately $100,000,000 in permanent improvements (Rec. pp. 289 and 306), a larger amount than would have been paid in dividends if dividends had been declared at the rate of 6%.

The Government has recently loaned to the New Haven nearly $70,000,000 (Rec. p. 309) and to the Boston & Maine between $50,000,000 and $60,000,000 if not more, plus an additional amount of $6,000,000 already approved by the Commission for improvements and equipment (Rec. p. 309), thus indicating its belief in the soundness and importance of these roads. It is of course necessary for the Government to protect these loans.

The present unfortunate financial situation of the New England Roads is, as we shall show, entirely due to factors beyond their control. The most serious of these is the question of wages. The increase in wage cost to the New England Roads since the test period is from less than $64,000,000 a year to $174,000,000 a year, or an added burden of $110,000,000 annually (Rec. p. 194). The standardization of wages by the Government and the various wage increases have affected the New England Roads in an unusual degree due to the relatively lower wage rate on the New England Roads prior to those changes (Rec. p. 874). In this connection it must be considered that wage increases bear doubly hard upon New England Lines because of the relatively larger number of man hours required to produce a given amount of revenue ton miles. It is impossible to get 100 miles' work for 100 miles' pay.

A second serious handicap of the New England Roads has been the cost of fuel and other railroad materials. Not only has the cost of fuel itself advanced very largely and to the disadvantage of the New England Roads which are situated at a distance from the source of coal, but their freight bills for transporting coal have been progressively increased with each increase in freight rates granted to the Eastern Roads. Increased fuel cost involves $25,000,000 a year over the pre-war period (Rec. p. 194).

A third handicap of the New England Roads is the per diem charge for freight car hire. The change from mileage to per diem basis occurred after the establishment of practically all the New England divisions. The progressive increases in the per diem rate since that time have resulted in an increased cost of car hire to the New England Roads of over $17,500,000 a year over what they would have had to pay under the mileage basis increased in the same percentage that the per diem has increased (Rec. p. 215). As we shall show later in this brief, the per diem burden is unavoidable to roads situated as are the New England Roads, with their terminal characteristics and unbalanced traffic, which inevitably result in relatively slow car movement and an excess of foreign cars.

Boston & Maine.

The book value of the Boston & Maine system is $240,504,801. The cost of reproduction of seven-eighths of the system as of June 30, 1914, was over $278,000,000 (Exhs. 1, 2). The fixed charges to be met out of operating income are $6,111,000 (Exh.

3). A 6% return on the mere book value would mean a net railway operating income of $14,430,288 (Exh. 1) to meet fixed charges and preferred dividends. This would leave a surplus of over $5,000,000 for equipment instalments, sinking fund and dividends on common stock (Rec. p. 306). Estimates of net railway operating income are: based on the adjusted year ended June 30, 1920, $2,663,491 (Exh. 3), or slightly more than 1% of the book value of the property; based on the adjusted year ended October 31, 1919, $3,409,300 (Exh. 61 revised); and based on the estimated year ending August 31, 1921, a deficit of $609,144 (Exhs. 3, 62). The corresponding average for the test period was over $9,800,000. The highest net income ever earned by the Boston & Maine was over $4,000,000 in 1916 *after* payment of all fixed charges, which at that time included over $2,500,000 of leased line rentals, since converted into preferred stock (Rec. p. 307).

On the basis of the first two estimates of net railway operating income given above, the road would fail by about $3,000,000 more or less to meet fixed charges (Exhs. 3, 61 revised). This estimate does not allow for the present reduction in tonnage (Rec. p. 307). Based on the third estimate the deficit below fixed charges will be $6,720,144 (Exh. 62 revised).

The Boston & Maine paid dividends on its common stock at the rate of 7% since at least 1900. In 1909 it reduced the rate to 6%, in 1911 to 5½%, in 1912 to 4%, in 1913 to 3%. Since then it has paid no dividends. It has about $39,500,000 par value of common stock outstanding (Rec. p. 193).

December 1, 1919, the Boston & Maine was reorganized and stock of leased lines was exchanged for first preferred stock of the reorganized company, thus eliminating fixed charges of over $2,500,000 a year. The normal dividend on this stock was reduced by 20% for five years and the $2,500,000 is being applied to the Sinking Fund to reduce the amount of bonds held by the Director General (Rec. p. 307).

The United States Government has already loaned to the Boston & Maine over $60,000,000 (Rec. p. 309).

In order to secure new capital it is necessary that existing indebtedness be refunded on reasonable conditions as it matures and this can only be done if an adequate return is earned on the common stock (Rec. p. 307).

Since 1910 approximately $48,000,000 has been used for additions and betterments of the system, and it is hoped that capital will be available to keep the plant and equipment up to required capacity (Rec. p. 306).

The Boston & Maine Railroad produces the greatest number of revenue ton miles of any New England carrier (Exh. 17).

Central Vermont.

The property investment account of the Central Vermont is over $22,000,000. Its actual value as of June 30, 1917, was nearly 50% greater than that. Six per cent. on the book value alone would be $1,340,000 (Exhs. 1, 2). Its fixed charges are nearly $900,000 (Exh. 3). On the basis of the latest estimates, it will show a deficit below fixed charges of over $1,300,000 for the year ending

August 31, 1921 (Exh. 62), and over $1,700,000 as computed on the constructive year ended October 31, 1919 (Exh. 61). The Central Vermont suffers to the extent of 1% of its total revenue from winter conditions. It also has to bear a burden amounting to 1% of its total revenue for customs at the Canadian border, a service which it performs on behalf of its connections as well as itself. Its wages have increased between 87% and 340% since the test period (Rec. pp. 312–6). Seventy-one per cent. of its total freight tonnage is interchanged with the Trunk or Canadian Lines (Exh. 15).

Maine Central.

The property investment account of the Maine Central is over $72,000,000. Its actual value as of June 30, 1916, was about 30% greater (Exhs. 1, 2). On the basis of the estimates for the year ending August 31, 1921, it will show a deficit below fixed charges of $1,753,000 (Exh. 62). The Maine Central has always been regarded as one of the strongest of the New England Roads. It came out of Federal control, however, with its earnings so low that for the first time since 1883 it was required to withhold dividends on its stock. Its present predicament is due largely to the increased cost of fuel, the increased wages and increased local taxes (Rec. p. 244). We will consider these items in greater detail later in the brief.

The New Haven.

The book value of the New Haven including the Central New England is $447,225,582 (Exh. 1). On June 30, 1915, the cost new plus land exceeded the book value by over $140,000,000 (Exh. 2). Six

per cent. on the book value is $26,833,535 (Exh. 1). Six per cent. on the excess shown in the reproduction value would increase this to over $35,000,000.

The book value of the New Haven excludes all non-carrier property. In Exhibit 3 over $6,000,000 of non-operating income is credited against the New Haven's fixed charges. Mr. Buckland testified that not more than $58,000,000 of debt was due to non-carrier property. The 4½% which is paid upon this debt amounts to slightly over $2,500,000 a year (Rec. pp. 319-20). It therefore appears that about $3,500,000 of non-operating income is credited against operating fixed charges.

The net income of the New Haven was a deficit after fixed charges for September, 1920, of $733,000; for October, $1,250,000; for November and December (estimated), $2,250,000 and $2,140,000 respectively (Rec. p. 299). The estimated incomes for the year ending August 31, 1921, are a deficit of $15,867,468 for the New Haven, and a deficit of $1,475,148 for the Central New England (Exh. 62 revised). These estimates are based on the actual figures for September, October and November, 1920, and on estimates for the remaining nine months, allowing for a falling-off of traffic and all possible reductions of expenses (Exhs. 68, 69).

In July, 1916, the operating ratios of the New Haven were: total, 61.1; freight, 64.3; passenger, 55.4. In September, 1920, they were: total, 88.4; freight, 94.7; passenger, 80.8. In October, 1920: total, 90.5; freight, 94.5; passenger, 85.1. In November, 1920: freight, 103.65; passenger, 87.4 (Rec. pp. 291, 483, 824). The estimated operating ratio for the year ending August 31, 1921, is 91.18 for

the New Haven, 93.17 for the Central New England (Exhs. 68, 69).

The New Haven paid dividends at the rate of 8% from 1900 to 1912. In 1913 it paid 7½%; in 1914, 1½%. Since that time it has paid no dividends. In 1915 the surplus available for dividends was over $2,000,000. In 1916 it was over $4,000,000. In 1917 it was over $2,000,000. In 1918 there was a deficit of over $7,000,000; in 1919 a deficit of nearly $8,000,000; and in 1920 a deficit of over $25,500,000 (Rec. p. 296).

During the last seven years the New Haven has devoted all the funds it could earn, borrow or obtain from the sale of non-carrier property to the improvement of its steam railway system. These expenditures total nearly $50,000,000. During 1920 the construction charges to capital totalled $11,772,000. If dividends had been paid during the same period at the rate of 6% the amount so paid out would have aggregated approximately $66,000,000 (Rec. pp. 289 and 832).

During 1916 and 1917 over $4,500,000 was realized by the increasing of certain unduly low rates (Rec. p. 290).

In units of efficiency the New Haven has increased very largely since 1915. The increase in net ton miles was 35%. The increase in passengers one mile was 36%. At the same time there was a decrease in freight train miles of 5.8% and a decrease in passenger train miles of 7.5%. The transportation department has been operating with a constantly decreasing number of man hours, notwithstanding the large traffic increase (Rec. pp. 289–90, 481).

At the present time the New Haven is in a condition to handle the maximum volume of traffic. During 1919, 3,948,700,000 ton miles were handled and there were no general embargoes except for one short period due to the shopmen's strike. In 1920 there were embargoes during a part of the year due to abnormal conditions, including bad storms, strikes in New York Harbor and concerted action by shippers to rush traffic (Rec. pp. 479, 823, 833-4).

With regard to the future it is evident that the New Haven will have to continue to improve, and in order to do so will have to expend large amounts of capital. The road serves almost exclusively the States of Rhode Island, Connecticut and the southern part of Massachusetts, embracing about 3,400,000 people. During 1919, 132 new manufacturing plants were under construction along its route (Rec. pp. 288-9).

The New Haven has already borrowed from the Government about $69,000,000 (Rec. p. 309).

The resources of the railroad are practically exhausted, and some method of rehabilitating its credit will have to be found if it is to make the improvements needed (Rec. p. 296).

The New Haven between 1914 and 1917 had been put on a sound financial basis and had made tremendous improvements in its facilities and thus in its earning power. Then the war intervened. Increased prices and upset conditions resulted in a very serious dislocation for all of the railroads and especially for those in the East. The New Haven's income became a deficit. All of this was produced by causes beyond the control of the management.

It is now again a question of building up. $50,000,000 of permanent improvements have been added to the system within seven years. Heavier bridges, heavier power, greater sidetracks, better yards, have been installed, all making for an easier production of transportation with a given amount of energy. As a result there has been a great increase in the amount of transportation produced and a smaller volume of train miles used to produce it.

But in spite of all that, the increased wages, the greater fuel costs, the increase in price of materials of all sorts—all factors beyond its control—have prevented the road from reaching a point where it can sustain itself (Rec. pp. 325–7).

Rutland Railroad.

The property investment account of the Rutland is over $25,000,000. Its actual value as of June 30, 1917, was about 12% greater (Exhs. 1, 2). On the basis of the adjusted year ended October 31, 1919, the Rutland will fail by $38,000 to meet its fixed charges (Rev. Exh. 61). It is true that the forecast for the year ending August 31, 1921, shows an income of $115,771 in excess of fixed charges (Exh. 62), but the falling off of traffic since that estimate was made has reduced that figure to a deficit. The Rutland, like the other northern New England Roads, suffers particularly from winter conditions and has been very adversely affected by the wage increases and standardization. It is also compelled on account of grades to use extra engines on three of its four engine divisions (Rec. pp. 334–5). Seventy-eight per cent. of its total freight tonnage

is interchanged with the Trunk and Canadian Lines (Exh. 15).

Individual Trunk and C. F. A. Lines.

It has been argued that the record before the Commission contained no evidence of financial or operating conditions of the individual roads which were defendants before the Commission. The claim has been made that the Commission's findings were based solely on group statistics. We have shown above the sort of testimony that was introduced as to each one of the New England Roads individually as well as with reference to the New England Lines as a group. Precisely the same sorts of evidence were introduced with regard to each one of the Trunk Lines and C. F. A. Lines individually. This evidence was not always in as great detail, due to the fact that statistics regarding those roads were not available to the New England Lines, and the respondents before the Commission, in spite of our repeated requests, were not always willing to furnish us with the information desired. Obviously detailed data as to operating and financial conditions on every one of more than 600 respondents could not be introduced, but of the 600 respondents a very few have any interchange whatsoever with the New England Roads and still fewer have either direct connection or any appreciable amount of interchanged traffic. As to each one of those respondents which interchange directly with the New England Roads or which interchange any important amount of tonnage, very complete statistics were introduced. These statistics were also combined into group statistics for the convenience of the Commission in dealing with them.

In order that this brief may not assume unwieldy proportions, we do not here review in detail the statistics as to the individual respondents. In Appendix E, *infra*, will be found a short summary of the nature of the evidence and exhibits which were introduced to show the financial condition, revenue needs, operating conditions and costs and amounts and proportions of traffic interchanged as to each one of the more important respondents before the Commission.

THE RECORD SHOWS THAT THE NEW ENGLAND LINES ARE SUFFERING FROM NEW AND EXCEPTIONAL HANDICAPS OF A PERMANENT CHARACTER WHICH HAVE ARISEN SINCE THE DIVISIONS COMPLAINED OF WERE ESTABLISHED.

Revenue and Property Investment per Unit of Traffic.

The New England Roads are required to invest 66% more than their connections in transportation property in order to produce an equal amount of revenue ton miles. Comparative figures for 1919 show:

	* Eight New England Lines.	Trunk and C. F. A. Lines.
Net revenue in mills per ton mile (1919).... (Exh. 29)	Deficit 0.36	Revenue 0.32
Freight proportion of operating expenses (April, 1917, Wettling) (Exh. 20)	63.03%	76.27%
Property investment per million revenue ton miles per year..... (Exh. 20)	$58,005	$34,958

* The seven complainants and the Grand Trunk in New England.

It therefore appears that the New England Roads' property investment per unit of traffic is 165.9% of that of the Trunk and C. F. A. Lines (Exh. 20).

Net Operating Income.

The net operating income of eight New England Roads (the seven complainants plus the Grand Trunk in New England) was 11% of that of the Trunk and C. F. A. Lines during the test period; it was only 2.9% during the period of Federal control (Rec. p. 204). The percentages of net Federal income to standard return were 12.8% for the eight New England Roads and 48.9% for the Trunk and C. F. A. Lines (Rec. p. 205).

Operating Handicaps of New England Roads.

TERMINAL CHARACTERISTICS, DIVERSITY OF ROUTES AND DIFFUSION OF TRAFFIC.

The manufacturing section of New England is an unusually dense network of stations, junctions, belt lines, yards and terminals. It is the destination of large quantities of raw materials from west and south of the Hudson and the originating point of finished products shipped to those regions. The points of destination and origin are spread over the entire lines of the New England Roads. They are not concentrated. There is an absence of well-defined main lines. The ratio of secondary and branch lines is unusually high (Rec. pp. 206–7).

This results in a relatively short freight haul, a relatively large amount of dropping and picking up cars, a relatively large number of switching classifications in yards, a relatively heavy detention of freight cars, and a relatively low productivity of

equipment and labor. All of these mean relatively high operating costs and investment per unit of traffic (Rec. p. 207).

FREIGHT STATION DENSITY.

Comparing the Boston & Maine and the New Haven with the Pennsylvania, Erie, B. & O. and New York Central, freight station density shows as follows:

	Two New England Roads.	Four Trunk Lines.
Miles of road per freight station	3.87	4.30
Revenue ton miles per mile of road (1919)	1,527,689	4,300,479

Therefore the station density of the two New England Roads is 111% of that of the four Trunk Lines, while their traffic density is only 35%. This means that the New England Roads have only 32% as many ton miles per station per year as the Trunk Lines (Rec. pp. 207–8).

The Pennsylvania has an agency station every 5.8 miles; New England, every 4.1 miles; the New Haven, every 3.3 miles (Rec. p. 512).

JUNCTION DENSITY.

The New Haven has one junction or intersection point for every 8.6 miles of road. The Boston & Maine has one for every 13 miles, and within a radius of 30 miles of Boston, one for every 8 miles (Rec. p. 208).

BRANCH LINE DENSITY.

The Boston & Maine and New Haven are a network of interlaced, crisscrossed lines with many diamond and five-pointed-star formations (Rec. p. 858).

The main line of the New Haven is only 11½% of the road's total mileage, while the Boston & Maine's principal freight route is only 203 miles long as against a total mileage for the system of 2,500 (Rec. p. 223). The main line of the Maine Central is 300 miles long; its total mileage is 1,216 (Rec. p. 341). On the other hand, over half of the Boston & Albany is main line (Rec. p. 857).

YARD DENSITY.

The large number of secondary and branch lines necessitates a large number of small switching yards with a heavy fixed expense. Many of these yards are too small to permit of certain improvements that make for efficiency (Rec. pp. 223 and 227).

Due to the age of many of the New England industries there are a large number of them without track connections of their own. This necessitates a very large amount of team track delivery (Rec. pp. 845–6). Because of the large number of small traffic-producing points and the relative absence of large ones the New England Roads cannot use their switch engines to pick up large quantities of traffic in bulk (Rec. p. 828).

CHARACTER OF TRAFFIC.

The New England Roads have practically no heavy, bulk traffic that moves in trainloads of large quantities and that can be handled at a very low cost.

The following table shows the production in New England and in the Eastern States of certain low grade commodities (Exh. 39):

	Coal, L. Tons.	Pig Iron, L. Tons.	Blast Furnaces.
New England	0	13,678	4
% N. E. to U. S.	0	0.04	0.9
Other Eastern States	490,488,233	27,286,843	365
% other Eastern States to U. S.	81.0	87.9	82.0

	Lumber, M. Feet.	Cement, Barrels.	Brick, Thousands.
New England	1,412,000	0	421,452
% N. E. to U. S.	4.4	0	5.7
Other Eastern States	4,003,700	57,298,560	4,464,308
% other Eastern States to U. S.	12.6	55.0	60.4

These commodities, which move in heavy volume in Trunk Line and C. F. A. Territory, constitute the most valuable revenue-producing freight a road can have and contribute materially to the successful operation of a railroad (Rec. pp. 262, 648, 777, 853).

"New England is known to be the home of the small manufacturer producing relatively high grade goods" (Rec. p. 532). The New England Roads are practically without large traffic producing points such as those in Trunk Line and C. F. A. Territory which produce coal, cement, grain, automobiles, fresh meat, etc. (Rec. p. 828). It is practically impossible and purely accidental for any commodity to move in a solid trainload in New England (Rec. pp. 849–50). Those few heavy commodities which New England does produce, like granite or wood pulp, move in relatively small quantities (Rec. p. 855).

The New Haven has no mines, saw mills, large steel mills (that perform their own switching), ports of reforwarding for export, or elevators which produce or receive large freight tonnage that can be

generally handled in through tonnage trains. There is little of its traffic that can be received or disposed of in lots of a considerable number of cars each or handled to or from such less expensive sidings as customarily serve territories producing raw materials and products of the farm, forest and mine. The greater part of the cars must be individually placed and picked up by switching crews or road locals. This situation requires a large increase in the number of employees and in the power used on the basis of ton mile comparisons (Rec. pp. 292–3).

Exhibit 131, introduced by Mr. Williams, shows a comparison in percentages of the character of the freight tonnage of the New England and the other Eastern Roads as follows:

Products of	New England.	Other Eastern.
Agriculture	6.73	4.31
Animals	4.77	1.60
Mines	17.34	66.34
Forests	16.43	2.78
Manufactories	27.32	16.88
Misc. C. L. Rates	13.49	4.31
L. C. L. Goods	13.92	3.78

We desire particularly to call attention to the figures for mine products, 17% in New England as against 66% for the other Eastern carriers. This comprises chiefly coal and, as was admitted by Mr. Bradley, the chief witness for the C. F. A. roads, constitutes the lowest cost and best revenue-producing tonnage there is (Rec. p. 777).

L. C. L. TRAFFIC.

Fourteen per cent. of the New England Roads' originated freight traffic is L. C. L., as against less than 4% for the remaining Eastern Roads (Rec.

pp. 532 and 708; Exh. 131). The interchanged L. C. L. is a considerable part of the total in New England, but a relatively small part outside (Rec. pp. 847 and 864). Quite a large volume of it goes as far west as the Mississippi River and is therefore overhead traffic for the Trunk and C. F. A. Lines (Rec. p. 873).

ABSENCE OF OVERHEAD TRAFFIC.

New England has no overhead traffic. Certain of its individual roads have some, but it is a relatively small amount.

Only 7% of the total freight traffic of the New Haven is overhead traffic (Rec. p. 228). That includes traffic carried by the New Haven between C. N. E. and other connections (Rec. p. 241).

On the other hand, about 40% of the Boston & Albany's traffic is overhead, handled through from its western gateways to its New Haven or Boston & Maine junctions (Rec. pp. 840 and 857–8).

Most of the Trunk and C. F. A. Lines on the other hand, and especially such roads as the Erie, the Wabash and the Central of New Jersey, have a tremendous overhead tonnage involving relatively small terminal expense.

PROPORTION OF LOCAL TRAFFIC.

On an average day there are 369 freight trains on the New Haven. Of these, 13 are fast, 140 are slow and 216 are local. Only 19.2% of the total run intact from origin to destination. The 369 trains call for 287 crew runs, of which 12 are fast, 125 slow and 150 local. The 150 local crews handled only 20% of the car miles, and only 17% of the

gross and net ton miles. Thus over half the freight expense handles only 17% of the ton miles (Rec. p. 231).

In order to give daily service it is necessary, on account of the numerous branch lines, to run a relatively large number of local freight trains. It is impossible to reduce this service for slight variations in the amount of business (Rec. pp. 231–4).

The New Haven has 3,000 companies which receive side-track delivery, or about 3 to every 2 miles of road. Approximately one-half of all the yard switching locomotive hours are spent in placing cars for unloading or pulling them from bulk tracks or private sidings after being loaded. This figure would be still larger if it were not for the large number of intermediate yards (Rec. p. 235).

Fifty-two per cent. of the New Haven's freight engine runs are on local trains, 48% on through trains. Seventy-two per cent. of the total are regular, necessary runs and depend little on the total volume of business (Rec. p. 209). Fifty-eight and one-half per cent. of the trains run are locals (Rec. p. 230). On the Boston & Maine, based on a one-day study, May 26, 1920, the following anaylsis was made (Exh. 19):

	Fast Freight.	Slow Freight.	Local or Mixed.	Total.
Per cent. of total freight trains	8.0	43.4	48.6	100.0
Per cent. of train miles	13.8	61.1	25.1	100.0
Average train run (miles)	94.0	76.0	28.0	54.0
Train speed (M. P. H.)	13.1	11.6	7.8	10.5
Net ton miles per train mile	619.0	596.0	189.0	497.0
Per cent. gross ton miles to rating ton miles	81.8	85.5	50.4	78.9
Per cent. of cars handled through	63.8	56.9	24.8	47.1
Wages of train crews per 1,000 net ton miles	$0.68	$0.88	$4.27	$1.17

The distribution of these trains with respect to length of run was: 100 miles or more, 13.5%; 50 to 99 miles, 36.5%; less than 50 miles, 50.0% (Exh. 19 and Rec. pp. 209–10).

The number of local or mixed trains was 244. For those trains there were required 140 crews. Local train crews have one extra man (Rec. p. 386).

TERMINAL HANDLINGS.

The New England Roads are obliged to give three terminal handlings per ton for a given number of ton miles, to two terminal handlings per ton by the other Eastern Roads (Rec. p. 848).

Terminal handlings of 53,993 cars received in one month at Harlem River and Maybrook (Rec. p. 228).

	No.	Per Cent.
Cars with 1 terminal handling	1,938	3.6
" " 2 " "	18,281	33.9
" " 3 " "	22,415	41.5
" " 4 " "	9,884	18.3
" " 5 " "	1,475	2.7

Forty-four and four-fifths per cent. of these cars had to be handled on local freight trains to their final destination (Rec. p. 230).

The average number of cars on the New Haven and C. N. E. is from 40,000 to 45,000. Of these 11,500 to 13,000, or 30%, are constantly being loaded or unloaded (Rec. p. 230).

DIFFUSION OF TRAFFIC AND DIVERSITY OF ROUTES.

A month's study of the distribution of approximately 36,000 and 18,000 cars received at Harlem

River and Maybrook respectively showed the following (Rec. pp. 224–6, 467–72; Exh. 75):

Station of Termination or Diversion.	Cars Terminated or Diverted. No.	Per cent.	No. of Stations or Districts of Destination.
Within 50 miles of Harlem River	1,831	5.1	Main line and 3 branches
Bridgeport (51 miles)	7,500	20.8	12
New Haven (69 miles)	12,758	35.5	17
Saybrook Junction	73	0.2	1 branch line
New London	2,114	5.9	1 secondary and several branch lines
Providence	3,164	8.8	15
Attleboro	2,824	7.7	17 and branches
Mansfield	594	1.6	(not stated)
Boston	4,639	12.9	(not stated)
At or before Hawleyville (81 miles)	7,688	42.8	4 and branches
Hawleyville to New Haven	2,954	16.4	(not stated)
New Haven to New London	1,233	7.0	(not stated)
New London to Boston (computed)	4,912	27.4	(not stated)
At Boston (282 miles)	1,153	6.4	(not stated)

The same results are shown on traffic received by the New Haven at its other gateways (Rec. p. 241).

The great diffusion of traffic makes it impossible to utilize heavier power to the full extent (Rec. p. 229).

Seventy per cent. of the New Haven's tonnage originates or terminates at 53 of its stations. Of these, 16 are on the main line, 10 on three branch lines, 8 on a group of branch lines between Fitchburg and Lowell and Fall River and New Bedford, and 19 widely scattered. Besides these there are over 500 small stations on the New Haven (Rec. pp. 226–7).

During October, 1920, the Maine Central received 3,010 loaded cars at its principal junctions. These cars were distributed to 431 destination stations,

besides being switched in most cases at several intermediate junctions (Rec. p. 340).

POORLY BALANCED TRAFFIC.

New England receives large quantities of raw materials which it turns into manufactured articles. It also receives large quantities of coal and other raw materials for its own consumption. The result is that for every five loaded cars received it ships out only two.

The New Haven in 1919 received 779,491 loaded cars and delivered only 382,487 (Rec. p. 229).

LOW FREIGHT TRAFFIC DENSITY AND SHORT HAUL.

The traffic of the New England Roads is spread out over a multitude of low density secondary and branch lines and receives a relatively short haul.

	Seven New England Roads.	Trunk and C. F. A. Lines.
Ton miles revenue freight per mile of road	1,217,000 approx.	3,638,058
Miles hauled-revenue freight	100.6	153.39
Average length of road (miles)	1032.0	961.55

(Figures are for 1918. Exhs. 17, 18; Rec. pp. 208-9.)

Mr. Alfred's* Exhibit 109, based on annual reports for 1919, shows an even smaller number of ton miles per mile of road for the New England Lines without the Boston & Albany (Rec. p. 656). Mr. Hildum's Exhibit 114, by including the C. P. R. and Grand Trunk in New England and by including several unimportant short Trunk and C. F. A.

* President and general manager of the Pere Marquette Railway Company (Rec. p. 639).

Lines and subdividing others, changes the average haul figures only to 112.19 miles for New England and 144.77 for the other Eastern Roads (Rec. p. 683). Mr. Williams' Exhibit 151 shows an average haul of 112.47 miles for the New England Roads including the Boston & Albany.

Length of haul of the 53,993 cars received at Harlem River and Maybrook: 26% had under 100 miles, 50% under 150, 30% had 200 miles, and 10% had 250 miles (Rec. p. 235). The average haul on traffic received by the New Haven at other gateways is still shorter (Rec. p. 243).

Of the 3,010 received by the Maine Central in October, 1920, 1,477 were hauled less than 100 miles (Rec. p. 340).

On May 26, 1920, on the traffic received by the New Haven from its western connections, the average lengths of haul were as follows (Rec. pp. 235–6, 242):

Road.	Haul-originated Traffic.	Haul-all Traffic.	New Haven's Haul.
A., T. & S. F.	1,698	1,180	112
A. C. L.	553	—	145
B. & O.	257	346	163
Can. Gov. R.R.'s	230	—	74
Can. No.	439	—	121
C. P. R.	488	—	56
C. R.R. of N.J.	less than N.H.	—	
C. & O.	306	—	152
C., B. & Q.	616	—	133
C., M. & St. P.	946	—	87
D. & H.	118	142	92
D., L. & W.	less than N.H.	324	
Erie	390	—	174
Gt. No.	1,464	—	183
Ill. Centr.	449	—	97
L. & N. E.	less than N.H.	—	
L. V.	182	297	120
N. Y. C.	343	516	90
N. Y. C. & St. L.	289	281	162
N. Y., O. & W.	less than N.H.	—	
P. R.R.	241	284	157

The New Haven's average haul for the eleven months ended May 31, 1919, was 60.11 miles for local traffic, 65.32 for New England interline, 136.29 for interchange, and 110.59 total (Exh. 67). The reason for the comparatively long local haul average is that motor trucks take a large part of the short distance business when weather permits. The road must be ready to handle it, however, in case of storm (Rec. p. 487).

WINTER CONDITIONS.

The Bangor & Aroostook is the northernmost road in the United States, except the Alaskan Railroad. The usual snowfall is 11 feet per year. For four winter months the temperature averages 20° below zero for at least half the time, and often gets down to 40° and 55° below. During January, February and March, 1920, snowplow train miles constituted 22.4% of total freight train miles, besides plows attached to freight and passenger trains. These conditions produce abnormal reduction in locomotive tonnage rating and undue freight car detention and per diem charges. Four or five feet of frost in the ground results in considerable heaving of the track in the spring, causing many derailments and large maintenance expense. The shortness of the maintenance season necessitates overtime work and pay (Rec. pp. 255–6).

The Rutland, Central Vermont and Maine Central have similar conditions to cope with (Rec. pp. 315–6, 334, 341).

Condition of Individual Roads West of Hudson.

The evidence introduced before the Commission by both complainants and respondents showed in great detail the operating conditions on each individual respondent having any direct or any important interchange with New England. (See Appendix E, *infra*, for an outline of the nature of this evidence.) This data was also summarized for the various roads in groups for the convenience of the Commission.

Freight Performance.

For 1919 the percentages of eight New England Lines (seven complainants and Grand Trunk in New England) to the Trunk and C. F. A. Lines were:

Net ton miles per mile of road per day	36.2%	(Exh. 21)
Net ton miles per loaded car per mile	77.6%	(Exh. 21)
Ratio of loaded to total car miles	106.4%	(Exh. 21)
Car miles per car day	73.5%	(Exh. 21)
Net ton miles per car day	60.8%	(Exh. 21)
Net ton miles per train mile	57.4%	(Exh. 22)
Net ton miles per locomotive day	55.9%	(Exh. 23)

This means that the New England Roads would have to have 164 cars for every 100 of the Trunk and C. F. A. Lines, 179 locomotives for every 100, and would have to run 174 train miles for every 100, in order to produce the same number of ton miles as the Trunk and C. F. A. Lines (Rec. pp. 213, 849).

The difference in the average carload is due to the difference in character of the traffic, the New England Roads having less coal and other heavy, low grade commodities that move in bulk (Rec. p. 388; Exhs. 39 and 131).

Mr. Williams' Exhibit 135 shows that the New England Roads use their tractive power to better advantage than the average of the other Eastern Roads. Their operating handicaps are so great, however, that their production of ton miles is less (Rec. pp. 829, 848, 853–4).

The large proportion of passenger traffic and the large number of branch lines make the average tractive power less on the New England Roads (Rec. pp. 859–60).

Relative Freight Costs.

The New England Roads' greater density of terminals, greater proportion of branch line mileage, greater diffusion of traffic and lower ton mile density require a greater effort of man power, motive power, and yard service per mile of road haul. And on top of that they have a shorter average road haul over which to distribute this greater burden (Rec. p. 848).

For 1919 the percentages of the eight New England Lines to the Trunk and C. F. A. Lines were:

Cost of yard expenses per 1,000 net ton miles	155.5%	(Exh. 25)
Freight train cost per 1,000 net ton miles (wages)	184.1%	(Exh. 26)
Freight train cost per 1,000 net ton miles (total)	176.7%	(Exh. 26)
Average fuel cost per ton (based on cost in September, 1919)	162.9%	(Exh. 27)
Average fuel cost per ton (based on cost January to August, 1920)	194.05%	(Exh. 28)

FUEL.

The last two items involve a burden on the New England Roads, proportionately larger than that of the other Eastern Roads, of $10,700,000 or

$19,600,000, depending upon which basis is used (Rec. p. 219). New England produces no coal (Exh. 39) and must therefore buy its entire supply elsewhere and in active competitive markets. Roads nearer the mines are not affected by embargoes and strikes on other roads, which interfere with obtaining contract coal and compel purchase of spot coal in competitive markets. They can place cars in preference for their own fuel, which often enables them to buy at minimum prices. In cases of emergency they can, and not infrequently do, actually confiscate coal *en route* over their lines consigned to New England Roads (Rec. pp. 830–1). This burden is further increased, as we shall show later, by every increase in freight rates.

YARD COSTS AND TRAIN SWITCHING.

New England yard costs would be still more in excess of those in Trunk Line and C. F. A. Territory if they included the cost of train switching. The train switching mileage as compared with road freight locomotive mileage is greater in New England than west of the Hudson. The percentages for 1918 were: New England, 11.7%; Trunk and C. F. A. Territory, 8.4% (Rec. pp. 218–9).

STATION COSTS.

Freight station costs per 1,000 ton miles in 1917 were $1.45 for the Boston & Maine and New Haven combined, as against 47 cents for the Pennsylvania R.R., Erie and Baltimore & Ohio combined (Rec. pp. 217–8).

Station cost does not depend on length of haul, but because of shorter average hauls the New Eng-

land Roads' station costs are relatively less recompensed than those of longer haul roads (Rec. pp. 850–1).

PER DIEM.

The terminal character of traffic in New England, with its diffusion, low density, frequent junctions, the high proportion of cars constantly being loaded or unloaded (about one-third on the New Haven (Rec. p. 230)), etc., its export business and the fact that it must return cars through the same gateways by which they arrive, inevitably decreases the rate of car movement and increases car detention. Adverse winter conditions have the same effect (Rec. pp. 591–4, 640–2, 648, 655–6).

The unbalanced traffic of the New England Roads is perhaps the chief cause of their per diem burden. They receive five loaded cars for every two shipped out. Therefore they always have a surplus of empty cars. The Car Service Rules forbid them to send out their own cars empty to get loads when, as always, they have foreign empties to return. The result is that there are more foreign cars on their lines than there are New England cars on outside lines. This condition always obtains except in times of such car shortage that the Rules permit of the ordering of cars about. The result is that they practically always have to pay per diem on many more cars than they receive it on (Rec. pp. 213–7, 640–2, 655–6, 836–8).

The reclaim allowed to switching roads of a certain number of days of per diem from the road haul roads is a recognition of the burden of per diem on the terminal roads and of the relation of per diem to divisions of joint rates (Rec. pp. 856–7, 865).

The per diem bill of the New England Roads is further increased when the outside lines, as frequently happens, load their own cars, or cars that should go elsewhere, into New England and return New England cars empty (Rec. p. 838).

As we have already indicated, the per diem basis for car hire established in 1902 has placed an added burden on the New England Roads of $17,646,168 a year (Rec. p. 215).

WAGE COSTS.

It is almost impossible in large parts of New England to get 100 miles' work done for 100 miles' pay, because of the impossibility of arranging train runs in such a way as to get the full benefit of the crew's time without being heavily penalized for overtime. This is illustrated by the conditions on the New Haven, the Boston & Maine and the Maine Central. They are doing well if they get 70% of the miles they pay for (Rec. pp. 261–2). The burden of constructive mileage for train crews is very much greater in New England than on the lines west. This is due to the large number of branch lines, the frequent junctions, the diffusion and lack of density of traffic. The New England Roads have a very large number of short runs of about 25 miles with an average of less than 50 miles per crew. This cannot be avoided (Rec. pp. 855–6). On the other hand, the Boston & Albany, with its two 100-mile divisions and few branches has an ideal operating line and is able to use its labor to the maximum extent.

The character of the Rutland makes it impossible to run many freight trains at an average speed of

12½ miles per hour. Seventy per cent. of them require payment of overtime wages under normal conditions and the number is greater in the winter (Rec. p. 335).

The large number of employees per unit of traffic in New England means large and relatively inflexible fixed charges (Rec. pp. 298–9).

The excess number of train miles per unit of traffic in New England increases pay rolls faster than revenue ton miles (Rec. p. 850).

Due to difference in character of service, which necessitates a relatively larger number of employees per unit of traffic, the recent standardization and increase of wages by act of Federal authority, has increased the New England Roads' pay rolls to a much greater extent than those of their connections (Rec. p. 484).

Labor costs in New England, since 1919 only, have increased $33,000,000, or about 25% of the entire freight and switching revenue of the New England Lines. The increase for the other roads in the Eastern Rate Group was $290,000,000—or only a little more than 10% of their freight and switching revenue (Exh. 8 and Rec. pp. 198–9).

The total New England pay rolls are as follows:

Annual average for test period	$63,800,000
1916	69,200,000
1919	129,350,000
1920 (adjusted to present rate of wages)	174,000,000

This means an increase of $110,000,000 annually since the test period, at least $70,000,000 of which was due to increased rates of wages (Rec. p. 194). The wage award of 1920 alone has meant an increase of approximately $33,000,000 (Rec. p. 199).

Since 1917 the amount of the New Haven's pay roll has increased from $40,000,000 to $83,800,000, though its man hours have diminished (Rec. p. 485).

All the New England Roads were particularly adversely affected by recent wage changes (Rec. p. 874). Those in Northern New England in particular were operating on a wage scale much lower than the average, prior to the standardization. This was made possible by the employment of local labor and the low living costs in that region. The result of standardizing wages throughout the country and of recent wage increases has therefore been a far greater increase in labor cost to those roads than to most others. The Bangor & Aroostook and the Central Vermont have increased their wage scales since before the war more than any other roads in the country. The percentage of increase since the test period on the Central Vermont is as large as 340 in some cases and averages about 250 or 275 for various classes of labor (Rec. pp. 313–4).

The increased annual labor cost in dollars since 1917 has been $9,000,000 for the Maine Central (Rec. pp. 244 and 341). This amounts to an increase of about two and one-half times.

The standardization also involved for the Rutland a 50% increase in local freight train units to avoid overtime penalty (Rec. p. 335).

The rapidly enlarging labor costs due to the various wage increases, not including the effect of the Adamson Law, necessary to perform the distributive and terminal character of the service, *versus* the relatively less number of traffic units from which rate advances accrue, cost the New

Haven at least $9,000,000 annually (Rec. pp. 298 and 484).

TRANSPORTATION OF FUEL AND OTHER MATERIALS.

In 1919 coal cost the New England Lines $5.03 per ton and the Trunk Lines and C. F. A. Lines $3.10 a ton, while in 1920 the cost to the New England Lines was $7.37 per ton and to the Trunk and C. F. A. Lines was $3.79 per ton, an increase to the New England Lines of nearly 50% and an increase to the Trunk Lines of only about 20% (Exhs. 27 and 28 and Rec. p. 219).

Each increase in freight rates increases the amounts which the New England Roads have to pay for the transportation to their gateways of fuel and other materials (*e.g.*, rails, ties, hard pine lumber, car oak, cast iron wheels, bar iron, iron castings, composition castings, journal bearings, etc. (Rec. pp. 814–6)) which they must use and which they do not produce. This increase is relatively much greater than in the case of roads situated nearer the coal mines and other sources of supply.

Considering only the 40% increase in freight rates granted in *Ex parte 74*, the amount to be paid by the New England Roads to the Trunk Lines for transportation of coal and other materials was increased from $9,561,585 to $13,386,219, an addition of $3,824,634 annually (Exh. 5).

To the New Haven and Central New England this increase amounted to $1,752,061 (Exh. 5), but considering all the freight rate increases within two or three years it came to $3,050,000 on coal alone (Rec. pp. 298 and 484). It is, therefore, conservative to double the figure of $3,800,000 in order

to arrive at the total increase for all the complainants on transportation charges for all their supplies.

The Maine Central's fuel cost has increased from $3.35 a ton in 1910 to $11.02 at the present rate; its ties cost $.446 in 1910, and $1.12 in 1920 (Exh. 30, p. 10). This means an increased bill for coal alone since 1916 of about $3,000,000 (Rec. p. 244).

No relief is in sight through getting more coal by water with water rates three to four times what they were before the war (Rec. p. 831).

PROPORTIONS OF FREIGHT AND PASSENGER TRAFFIC.

Because of the relatively high proportion of passenger traffic on the chief New England Roads (approximately half-and-half on the New Haven, for example, as against 28% passenger to 72% freight for the lines west of the Hudson River) and because of the greater increases recently granted in freight than in passenger rates (for example, 40% and 20%, respectively, in *Ex parte 74*, on top of the earlier 5%, 15% and 25% freight advances), the New England Roads, though their need has been greater, have received less benefit than have their connections from the aid afforded to the Eastern Roads by the Interstate Commerce Commission and the Railroad Administration (Rec. pp. 680-1). In other words, because of the method adopted in permitting the roads to raise the amount of their revenues, the roads which had need of the greatest additional revenue received the least.

This loss in increased revenue amounts to about $7,300,000 a year to the New Haven alone (Rec. pp. 298 and 484).

An additional effect of the adoption of this method has been referred to above in connection with the increased freight charges which the New England Roads must pay to their connections for transportation of fuel and other necessary railroad materials which New England does not produce.

GREATER RELATIVE INCREASE IN COSTS.

Not only labor costs but also other costs accrue much more rapidly because of distribution of traffic and short hauls than do the ton miles on which revenue increases are based. With the growth of traffic this has resulted in relatively much greater costs to the New England Roads than to outside roads which have fewer terminal characteristics. This is a very important item, but an indefinite one which cannot be estimated (Rec. pp. 298–9, 484).

In recent years New Haven expenses have been increased as follows (Rec. pp. 298–9, 484):

Item.	Increase in Annual Expense.
Per diem	$6,259,750
Fuel Transportation	3,050,000
Proportions of Freight and Passenger Traffic	7,300,000
Labor Costs	9,000,000
	$25,609,750

RELATIVELY GREATER ADVANCE IN SCIENCE OF ROAD MOVEMENT THAN IN TERMINAL SERVICE.

Spectacular economies have been made in railroading since 1902, but mainly in train operation. This has not only upset the former relation between terminal and haulage costs, but has thrown constantly increased burdens on terminal service.

Therefore terminal costs have tended to increase, while transportation costs have decreased. This, of course, is to the great relative disadvantage of terminal roads (Rec. pp. 221–2, 859). Terminal service presents the greatest operating problem at present confronting the railroads (Rec. p. 229). At the time when the New England Roads' divisions were established, the very large proportion of total expenses involved in terminal service was not known (Rec. p. 228). The increased relative disadvantage to the terminal road further increases its per diem burden by augmenting the difference in time required to return cars.

LOCAL TAXES.

The State of Maine taxes railways upon their gross transportation revenue per mile of road in the State, with an increasing rate up to a maximum of 5.5% as gross revenue increases. Thus the recent rate increases to meet advanced operating costs have largely increased the taxes assessed upon the three roads operating in that State. As an illustration, the Maine Central paid $636,861.55 State of Maine excise tax in 1918. Its estimated Maine tax at present is $1,121,517 per year, or an increase of 75%, with very little change in volume of traffic handled. This amounts to over 60 cents a ton on the road's entire inter-Trunk Line traffic (Exh. 30, pp. 8 and 9; Rec. p. 247).

AN ANALYSIS OF THE FREIGHT TRAFFIC INTERCHANGED BY THE NEW ENGLAND LINES WITH THE LINES WEST OF THE HUDSON AND THE REVENUE DERIVED FROM SUCH INTERCHANGE DEMONSTRATES THAT SUCH REVENUE IS INADEQUATE.

Description of the Interchange Traffic.

The New England railroads which are appellees before this court interchange traffic both with Trunk Line Roads and Canadian Roads. The order here in question applies only to merchandise traffic interchanged on joint rates between New England and Trunk Line carriers, and does not include traffic passing through Canada, nor does it apply to rates on coal and certain other commodities. The total amount of the traffic involved in the order during a typical twelve-month period amounted to over 16,000,000 tons (Exh. 9 revised).

This traffic is handled by the following Trunk Lines and in the following approximate amounts:

New York Central (including Boston & Albany)	6,400,000	tons
Pennsylvania Railroad	3,300,000	"
Delaware & Hudson	2,300,000	"
New Jersey Central	1,650,000	"
Erie	850,000	"
Lehigh Valley	750,000	"
D., L. & W.	550,000	"
Long Island	250,000	"
Lehigh & New England	125,000	"
New York, Ontario & Western	65,000	"

(Exh. 9 revised)

These are the only Trunk Line carriers having a direct interchange with any of the New England Roads. A very large part of this traffic passes over

the rails of these direct connections to those of other roads beyond, much of it going outside of Trunk Line Territory into C. F. A. or more distant territory.

This enormous tonnage is interchanged by the New England Roads at the following junctions, in approximately the following amounts, and with the following direct Trunk Line connections: the

New Haven Railroad at Harlem River (and other New York Harbor points)	5,320,000 tons	Penn., C. N. J., L. V., L. I.
New Haven and Boston & Maine at Boston & Albany junctions in New England	3,040,000 "	B. & A. (N. Y. C.)
Boston & Maine at Rotterdam Junction	2,240,000 "	N. Y. C.
Central New England at Maybrook or Campbell Hall	2,200,000 "	Erie, L. & H., N. Y. C., L. & N. E., N. Y. O. & W.
Boston & Maine at Mechanicville	2,120,000 "	D. & H.
Rutland at Norwood	355,000 "	N. Y. C.
Boston & Maine at Troy	331,000 "	N. Y. C., D. & H.
Central New England at Beacon	221,000 "	N. Y. C.
Rutland at Chatham	112,000 "	N. Y. C.
Rutland at Rutland	75,000 "	D. & H.

The Central Vermont interchanges a considerable tonnage with the D. & H. at Rouses Point and there are a few other relatively unimportant junctions with a small interchange (Exh. 13).

The through routes and joint rates on all of this traffic were established many years ago. As we have already indicated, the earliest of these joint rates were established and divided in the early seventies. These were between the small New England Roads which now are included in the New Haven system and the Pennsylvania system (Rec. pp. 361–2, 505–6). The rates were divided by agreement between the

carriers at the Western New England gateway. The divisions so established were based upon a block system which is the usual method of making divisions. This means that the territory of each road was divided into blocks and all points within the same block took the same division despite the differences in the length of haul or in the character of the terminal service performed.

Some time after the establishment of divisions between New Haven Territory and the Pennsylvania, certain other Trunk Lines desired to participate in this traffic. The Baltimore & Ohio, for example, although it reached New England only through an intermediate carrier, established joint rates and divisions with New Haven Territory. These rates were established to and from B. & O. points which were largely competitive with Pennsylvania points. The rates, therefore, had to be based upon the rates *via* the Pennsylvania, and in order to obtain the consent of the New Haven to their establishment the Baltimore & Ohio had to allow the New Haven the same divisions granted by the Pennsylvania (Rec. pp. 362, 550). In the same way, other roads established joint rates and divisions, such as the Erie, the D., L. & W., the New York Central and many more. In each case the effect of competition both as to the rate and as to the divisions was clearly felt (Rec. pp. 362–4, 522, 540, 559, 597–9).

The same thing occurred in connection with the Boston & Maine. Prior to 1900 the Fitchburg was a separate railroad which had its own joint rates and divisional arrangements with the West Shore and other Trunk Lines. These were affected by competitive factors as in the case of the New Haven.

When the New York Central acquired the Boston & Albany and when the Boston & Maine acquired the Fitchburg an adjustment of divisions occurred in which again competition played an important part (Rec. pp. 264–6, 407).

In like manner the joint rates and divisions between other New England Roads and the roads west of New England grew up. In most cases the block system was adopted. Often there were special allowances made to one road or another on account of particular services or circumstances. For example, the New York Harbor floatage service was recognized as entitling the New Haven Road which performed that service to an arbitrary allowance. Sometimes this allowance was fixed in cents, sometimes in an arbitrary number of miles to be added to the New Haven mileage allowance (Rec. pp. 506, 515–6). The Boston & Maine, prior to the acquisition of the Fitchburg, and the Maine Central were allowed a terminal deduction of one cent per hundred pounds on account of the extra cost of terminal handling in their territories (Rec. pp. 266, 586–7). The New York Central received terminal deductions for traffic originating or terminating in or near New York City (Rec. p. 267). The Pennsylvania received an arbitrary allowance for the Union Railroad in Baltimore (Rec. pp. 506, 515). The Baltimore & Ohio insisted upon this same allowance although it had no connection with the Union Railroad (Rec. p. 550). The block system resulted in constructive mileages being received in many instances on both sides of the Hudson. For example, if a block was 100 miles long, the road received a division based on 100 miles to all stations within

that block whether the actual mileage was one mile or 100 miles. Besides this sort of constructive mileage there was sometimes an additional constructive mileage in lieu of an arbitrary deduction as suggested above in connection with the New York Harbor floatage. Sometimes also there was an additional constructive mileage which arose as a result of the consolidation of two roads or the construction of a new line which permitted traffic to follow a shorter route than that by which the division had been established (Rec. pp. 265-6, 407, 575).

In presenting their complaint to the Interstate Commerce Commission the New England Roads realized that it was not possible to put in evidence every joint rate between every point in New England and every point outside of New England. The testimony shows that there are countless numbers of these rates, and the Commission as an expert body with long experience in railroad affairs was aware of this fact. The endeavor of the complainants was to present in as brief a form as possible a picture of the entire situation. To have dealt with every rate would have taken many years both for the presentation of the evidence and for the determination by the Commission. To present an outline picture was possible, and for the Commission to deal with the situation in a broad, general way was the only feasible course.

Acting upon this theory, the New England Roads presented to the Commission exhibits and testimony setting forth for representative points in every percentage block in New England to or from which joint rates applied data to show the mileage, the percentage basis of the division, the rate and the

division of the rate, the corresponding local rate, the relation of the division to the local rate, the relation of the division to the mileage prorate, the ton mile earnings, and constructive mileage and terminal or other arbitrary deductions, if any. They did not attempt to give all of this data for every point in every block. They did, however, at the request of the respondents, introduce lists of their chief tonnage points regardless of location. The mileages of these points from the various gateways were also put in evidence. This data was further supplemented by maps and figures showing the location and extent of every block in New England for all traffic moving on joint rates. Thus was presented a complete picture of the entire divisional structure in New England, including the actual divisions to at least one point in each block and data as to every other important point sufficient to enable the Commission to determine exactly what the situation amounted to.

The exhibits were limited to first- and sixth-class rates. The record shows, however, that the same basis of divisions applies to all class rates and with a very few exceptions to all commodity rates, except those on coal and coke which were not in issue (Rec. pp. 564, 886, 887). In other words, the evidence related to divisions on all traffic governed by the Official Classification which includes all class rates and all commodity rates except those on high explosives, certain dairy products and coal (Rec. p. 584).

That these exhibits constituted a fair illustration of the whole divisional situation was expressly admitted by the chief traffic witnesses for the Trunk

Lines and the C. F. A. Lines respectively (Rec. pp. 507, 517, 518, 520, 689, 759). Mr. Wright, the general traffic manager of the Pennsylvania Railroad, stated that he had started to make up statements himself for the purpose of portraying the situation before the Commission, but he decided to use the exhibits introduced by the complainants as they were not prejudicial in any way and as they were fair and illustrative (Rec. pp. 507, 520). On page 518 of the record Mr. Wright, having been asked whether he considered complainants' selection of divisions in their exhibits fair, replied:

> "Yes; not prejudicial to either side. It is illustrative, I would say. I feel that it is very difficult, as I said, to call it typical. You cannot take particular points and make much of a criticism of a basis of divisions. You have to take the results of the thing as a whole, and that is what it has been very difficult to do. I agree, as you say, that those points were not taken with the idea of showing the situation favorable to New England."

Mr. Bradley of the Ann Arbor Railroad testified that he was chairman of a committee organized to prepare an analysis of the divisions between the New England Lines and the C. F. A. Lines for use in this complaint; that he examined the New England divisions exhibits and that they were fair as far as they went (Rec. p. 689). He also stated that complainants' exhibits present a complete picture of the grouping and mileage in New England, though they fell short of constituting a like complete picture of C. F. A. Territory (Rec. pp. 698, 699).

The exhibits introduced by complainants show-

ing the data outlined above gave the same information for representative points in every region to or from which joint rates with New England apply. They did not purport to present as full a picture of the situation outside of New England as within New England, and the picture presented was less complete for more distant regions than it was for the Trunk Line region. The reasons for this difference were that the great bulk of the traffic interchanged between New England and outside territories originates or terminates in Trunk Line Territory, somewhat less goes to or from C. F. A. Territory, and still less to or from the South and Transcontinental Territory. There are no joint rates or divisions between New England and Western Territory except a few transcontinental points. To present a complete picture of New England interchanged traffic it was not necessary to go into as much detail with regard to distant territory where comparatively little traffic moved. The Commission could obtain a working picture of the situation without having illustrations from every block or even every road participating in any through business with New England. We emphasize this point particularly in view of the stress laid by the appellants on the alleged fact that the record contained no evidence of the amounts received out of joint rates by some two hundred and fifty of the respondents located largely in Southern or Western Territory, most of which interchange no business with New England on joint rates (see Bradley's affidavit, Rec. pp. 932–6. See also pp. 164–6, *infra*).

Furthermore, if the respondent roads, (and all the roads in the country were made respondents,) felt

that in any particular the New England presentation failed to set forth a fair, typical and illustrative picture, they had ample opportunity to remedy the failure.

As a matter of fact, the respondents were requested by the complainants to furnish evidence of what they considered typical divisions, and in the hearings many of them did so. Mr. Bradley, for example, whose testimony is referred to above, after stating that the New England exhibits presented a complete picture of the situation in New England but failed to make it complete in C. F. A. Territory, proceeded to testify at great length and to introduce 16 different exhibits purporting to present a complete picture for C. F. A. Territory (Rec. pp. 680–99, 750–85, Exhs. 128, 129, 152–66). Mr. Bradley testified that these exhibits introduced by him were representative as applying from all points in C. F. A. Territory, and that they gave what he considered a fair picture of the New England grouping (Rec. pp. 759, 760).

In the same way, the other respondents, or as many of them as saw fit to do so, introduced exhibits and testimony completing the picture presented by the New England Lines in so far as they considered it to be incomplete. The Pennsylvania introduced Exhibits 70 and 71 and the testimony of Mr. Wright (Rec. pp. 505–21). The D., L. & W. introduced the testimony of Mr. Lawrence at pages 521 to 539 of the record. The Erie introduced Exhibits 73 and 74 together with the testimony of Mr. Adams at pages 540 to 544 of the record. The Baltimore & Ohio introduced Exhibits 79 to 81 and 194 as well as the testimony of Mr. Anderson at pages 545 to 552

and 869 to 871 of the record. The Delaware & Hudson introduced Exhibit 82 as well as the testimony of Mr. Story, pages 552 to 559 of the record. The Lehigh Valley introduced Exhibit 83 as well as the testimony of Mr. Johnson, pages 559 to 564 of the record. New York Central introduced Exhibits 84 to 88 as well as the testimony of Mr. Kallman, pages 564 to 604 of the record. The Central Railroad of New Jersey introduced Exhibits 89 to 94 as well as the testimony of Mr. Ewing, pages 604 to 621 of the record. Mr. Young, for the Northampton and Bath Railroad, testified at pages 807 to 811 of the record and introduced Exhibits 187 to 190.

In Appendix D, *infra*, we discuss somewhat more in detail the nature of the information and the completeness of the picture of the existing divisional structure presented by all this testimony.

The point which we wish to emphasize here is that the Interstate Commerce Commission had before it, in making the order in suit, a great mass of information presented by both parties which showed in a broad but very complete way the actual existing situation with regard to joint rates and divisions, and that the Commission determined that this information was sufficient to enable it to deal intelligently with the complaint made by the New England Lines. Whether this Court would have agreed with the Commission on the basis of the evidence before it, is not the question here. The District Court found, and we submit that this Court should also find, that the Commission had before it ample evidence of the existing divisions to justify it in exercising its jurisdiction over them.

Amounts and Proportions of Freight Traffic Interchanged with Connecting Carriers.

For the constructive year* ended October 31, 1919 (on the basis of rates then in force), the complainant roads interchanged 34,099,720 tons of freight with their Trunk Line and Canadian connections. This consisted of 14,004,300 tons of coal and 20,095,420† tons of "merchandise." The total revenue from this tonnage was $191,505,655, of which the New England Lines received $67,272,648 and the other roads $124,233,007 (Exh. 9A and Rec. p. 199).

The 34,099,720 tons of interchanged traffic were classified by territory of origin or destination as follows: Trunk Line, 61%; C. F. A., 27%; Western, 3.7%; Canadian, 3%; Southern, 2.8%; Transcontinental, 2.5%. From this traffic the revenue was divided as follows (Exh. 14 and Rec. pp. 201–2):

	New England Share.	T. L. Share.	C. F. A. Share.	All Others' Share.
Trunk Line Traffic	46.6%	53.2%	—	0.2%
C. F. A. "	34.5%	33.0%	27.0%	5.5%
Western "	20.0%	10.0%	15.0%	55.0%
Canadian "	35.5%	1.5%	1.0%	62.0%
Southern "	21.0%	25.5%	3.5%	50.0%
Transcont. "	7.5%	7.0%	12.5%	73.0%
Total.....	35.1%	35.7%	9.6%	19.6%

The proportions which the interchanged freight tonnage and the revenue therefrom bear to the total

* Six alternate months, December, 1918, to October, 1919, converted into a constructive year on the basis which the freight revenue for those months bore to the total freight revenue of the twelve months ended October 31, 1919 (Exh. 9A and Rec. p. 199).

† The difference between this figure and the total of something over 16,000,000 tons mentioned above (p. 101) is explained by the inclusion here of traffic interchanged with Canadian Lines.

freight tonnage and revenue of the New England Roads are as follows (Exh. 15 and Rec. p. 202).

Road	Tonnage (%).	Revenue (%).
B. & M.	59	54
C. N. E.	96	94
C. Vt.	71	65
Me. C.	37	36
New Haven	67	56
Rutland	78	67

The total (unduplicated) tonnage of the complainants was: Interchanged, 34,099,720 tons; interline New England, 5,187,878; local, 14,566,655. Their revenues from these three classes were $67,272,648, $21,393,265 and $33,564,446, respectively (Exh. 11 and Rec. p. 200).

The Boston & Maine had 14,219,646 tons of interchanged tonnage which produced $23,860,503 of revenue, as against 5,861,563 tons of local and 3,954,638 tons of New England interline tonnage which produced revenue of $12,962,610 and $7,091,818, respectively (Exh. 10 and Rec. p. 200).

The figures for the New Haven were: Interchanged, 18,366,819 tons, $28,068,510; local, 5,565,661 tons, $15,709,488; interline New England, 3,271,722 tons, $6,210,087 (Exh. 10 and Rec. p. 200).

Inadequacy of Present Divisions as Compared with Local and New England Interline Rates and as Compared with Cost of Service.

The total freight traffic of the New Haven and C. N. E. combined is distributed among local, interline New England, and inter-Trunk Line as follows (Exh. 67; Rec. pp. 486–7, 498, 826):

	% Ton Miles.	Rate per Ton Mile.	% Revenue to Average Cost.	Average Haul Miles.	Gross Revenue.	% Gross Revenue.
Inter-T. L.....	80.7	.01541	82	136.29	$38,440,025	54
Intra-N. E....	6.8	.04371	240	65.32	9,260,800	13
Local.....	12.5	.06123	330	60.11	23,587,481	33
Total.....	100	.023062	—	100.59	$71,288,306	100

These figures are based on eleven months ended May 31, 1919, adjusted by the 40% increase. The inter-Trunk Line rate was increased only 37%. If 40% were realized, the rate would be .01575 (Rec. p. 498).

The average total operating cost and revenue per revenue ton mile and the operating ratios on freight for the two roads combined, not including car hire, for September and October, 1920, were (Rec. p. 486):

	Cost.	Revenue.	Ratio.
September.....	.018696	.019739	94.72
October.....	.018824	.019912	94.54

It therefore appears that the two roads combined are actually handling over 80% of their ton miles at a rate of .01541 per ton mile, while the average cost of all their freight traffic is between .018696 and .018824 per ton mile or 22 to 23% more than was earned on the interchanged. In other words, they receive less than cost for this service (Rec. pp. 458, 486).

Approximately 46% of the revenue is produced by approximately 19.3% of the ton miles while it requires 80% of the ton miles to produce 54% of revenue (Rec. p. 488).

While the local is different in character, the intra-New England has no more terminal handlings than the inter-Trunk Line, though it is paid for at substantially three times the Rate (Rec. p. 488).

The New Haven has for a long time found its passenger business more nearly remunerative than its freight. Its operating ratios were (Rec. pp. 237–8, 291, 824):

Period.	Passenger.	Freight.
July, 1916	55%	64%
First six months of 1920	84%	111%
September, 1920	81%	95%
October, 1920	85%	95%
November, 1920	87%	104%

The conclusion is inevitable that freight as a whole is scarcely paying its way, and that the great loss is from the 54% of revenue derived from 80.7% of the ton miles, in other words, from the freight interchanged with the Trunk Lines (Rec. p. 488).

This is supported by the fact that the local situation has been canvassed within the last three years, while the through situation has not been canvassed for many years (Rec. p. 238).

The 80.7% of ton miles represents 67% of total tonnage (Rec. p. 238). On the Central Vermont and the Rutland the percentage of tonnage interchanged with connections outside of New England is even greater than on the New Haven, being 71% and 78%, respectively (Exh. 15).

The fact that these two lines, and the C. N. E. in even greater degree, obtain by far the greater part of their revenue from interchange business and yet are unable to earn net income demonstrates that this business is being done at a loss. Here revenue evidence is division evidence.

The New Haven's present rate of 15.41 mills on inter-Trunk Line business is only 28% higher than that of the Trunk and C. F. A. Lines on the same business, even if their 1919 rate of 8.92 is increased by only 35%, to 12.04 mills. Comparing this with

relative ton mile costs, based on 1919, shows 15.51 mills for the New Haven against 8.6 for the Trunk Lines, or 80% higher cost for the New Haven. Therefore the latter is not so well paid as are its connections on business interchanged with them, considering the character and cost of its service (Rec. pp. 488–9).

The fact that the Boston & Maine and Maine Central derive the larger part of their revenue from freight and the larger part of their freight revenue from interchange business tells the same story.

Inadequacy of Present Divisions as indicated by their Relation to Local Rates or to Mileage Prorate, when considered in connection with Length of Haul and Character of Service.

The percentages which the divisions of joint rates constitute of local rates, east and west of the western New England Junctions, and the relations of the divisions to mileage prorate east and west, are shown for the various New England Roads in the following Exhibits: Boston & Maine, 43–44; Central Vermont, 46–51; Maine Central, 45; New Haven and C. N. E., 52; Rutland, 64.

All these exhibits are made upon the same plan. Items L and O show the percentages of the divisions to the local rates east and west. Items V and X show the amounts of the divisions, in cents per 100 pounds, accruing in excess of, or less than, the mileage prorates east and west. Items P and Q show the ton mile earnings east and west.

Appendices B and C of this brief, based on those exhibits, show that the New England Roads' divisions of these rates on approximately two-thirds of the joint traffic constitute a smaller proportion of

their corresponding authorized local rates than do their connections' divisions.

Plaintiff's Exhibits above referred to, as well as some of Defendant's Exhibits, show the relation of certain existing divisions to mileage prorate east and west of the Hudson.

Exhibit 82, pages 18 to 32, shows joint rates between Boston & Maine points and Baltimore, Pittsburgh, Chicago and Cincinnati *via* Mechanicville, Delaware & Hudson (Wilkesbarre) and Pennsylvania Railroads. Altogether, 232 rates are shown, counting both eastbound and westbound. In 113 of these the Pennsylvania gets more than a mileage prorate and in 15 it gets just a mileage prorate.

The same Exhibit, pages 2 to 13 and 18 to 21, shows 376 joint rates between Boston & Maine stations and Trunk Line points reached *via* the Delaware & Hudson, the Erie and the Pennsylvania. In 119 of these the Boston & Maine gets less than a mileage prorate.

Analysis of Exhibits 43 and 44 shows that on traffic moving to or from Boston by the Boston & Maine the New England Roads get divisions amounting to less than a mileage prorate on 57% of the through rates, and on 78% of them they get not over ½ cent per 100 pounds more than a mileage prorate.

	N. E. Division less than Mileage Prorate.	N. E. Division not over ½c. above Mileage Prorate.	Total Number of Rates shown (counting Eastbound and Westbound).
Trunk Line Points	64	92	112
C. F. A. Points....	8	14	30
Transcontinental Points.....	22	22	22
Total.....	94	128	164

That is to say, to and from Boston, its heaviest tonnage point, although it has the short haul and must do the terminal handling, the Boston & Maine in 94 cases out of 164 gets less than a mileage prorate, and in 34 cases more it gets not over ½ cent more than a mileage prorate.

Boston & Maine Divisions.

New York City is the most important market in the East. It is the destination of a tremendous quantity of freight from New England. It is the point at which the competition between New England's industries and industries in Trunk Line Territory principally focusses. The rates and divisions on traffic to and from New York are therefore of vital importance to New England. The New Haven reaches New York with its own rails. The Boston & Maine can reach New York only in connection with other carriers. The following, taken from Exhibit 43, shows the existing rates and divisions to New York from typical stations on the Boston & Maine *via* Troy, N.Y.:

	Fitchburg.	Boston.	Concord.	Portland.	St. Johnsbury.
Mileage in New England	140	190	184	262	232
Mileage west	146	146	146	146	146
Through rate (1st class).	74	74	84	91	101.5
Revenue to N. E. Lines	40.6	40.6	57.6	60.2	73.9
Revenue to lines west	33.4	33.4	26.4	30.8	27.6
Anderson Scale for same haul in N. E.	73	82.5	82.5	91.5	97
Per cent. of N.E. Division to Anderson Scale	55.6	49.2	69.8	65.8	76.2
Per cent. of revenue west to local rate west	60.2	60.2	47.6	55.5	49.7
Revenue to N. E. in excess of mileage prorate (cents)	4.3	1*	10.7	1.8	11.6

*Less than mileage prorate.

A careful examination of the figures in the first column, showing the rates and divisions from Fitchburg, will be helpful because it will enable the Court to understand the basis upon which this comparison and succeeding comparisons are made.

The first figure shows the distance from Fitchburg to Troy, which is the junction point between the Boston & Maine and the New York Central. The second figure shows the New York Central's mileage from Troy to New York. It will be noted that the hauls east and west of the junction point are evenly balanced, 140 miles east and 146 miles west. The joint through first-class rate is 74 cents, and it divides so as to give 40.6 cents to the Boston & Maine and 33.4 cents to the New York Central. The Anderson Scale* for 140 miles in New England is 73 cents, so that the Boston & Maine receives as its division on this traffic only 55.6% of the Anderson Scale. The New York Central receives as its division 60.2% of its local rate. In other words, the New York Central receives as its division a *higher* percentage of its local rate than the Boston & Maine's percentage of the Anderson Scale. Finally, the last figure in the column shows that the revenue accruing to the Boston & Maine in excess of a mileage prorate is 4.3 cents.

We ask special consideration of the figures in the Boston column. It is not necessary to say that the Boston-New York traffic is of very great importance. It will be seen that for hauling this

* The "Anderson Scale" is the rate established for New England by the Commission (*Proposed Increases in New England*, 49 I. C. C. 421) and is considerably higher than Trunk Line and C. F. A.

important traffic from Boston to Troy, as part of the through movement to New York, the New England Lines receive slightly *less than half* the Anderson Scale, whereas the New York Central, with much more favorable operating and traffic conditions, receives over 60% of its local rate. *In view of the very great handicaps under which the New England Lines operate we lay special stress on the fact that the Boston & Maine receives on this important traffic less than it would receive under a mileage prorate.*

There is also a very heavy movement of traffic between Boston & Maine points and Newark, N.J., Philadelphia, Pa., Baltimore, Md., and Washington, D.C., *via* Jersey City. This is joint traffic in which two New England Lines, the New Haven and the Boston & Maine, participate. The following table, taken from Exhibit 43, shows the rates and divisions from Fitchburg to these points:

From Fitchburg to	Newark.	Philadelphia.	Baltimore.	Washington.
Mileage in New England	241	241	241	241
Mileage west	8	99	199	242
Through rate (1st class)	74	74	87.5	95
Revenue to N. E. Lines	59.3	59.3	58.6	57
Revenue to lines west	14.7	14.7	28.9	38
Anderson Scale for same haul in N. E.	88	88	88	88
Per cent. of N. E. Division to Anderson Scale	67.4	67.4	66.6	64.8
Per cent. of revenue west to local rate west	42	32	40.1	49
Amount to N. E. in excess of mileage prorate	12.3*	6.8	10.6	9.6

*Less than mileage prorate.

In connection with the above figures allowance must be made for the fact that the New England Lines perform the expensive carfloat and lighter-

age service between Harlem River and the New Jersey shore; that the haul in New England is a joint-line haul as compared with a single-line haul beyond Jersey City; and that the freight traffic density on the Newark-Philadelphia-Baltimore route is much heavier than that in New England.

Corresponding figures with respect to traffic from Boston to the same points *via* Jersey City are shown below (from Exhibit 43):

From Boston to	Newark.	Philadelphia.	Baltimore.	Washington.
Mileage in New England	271	271	271	271
Mileage west	8	99	199	242
Through rate (1st class).	74	74	87.5	95
Revenue to N. E. Lines	52.2	52.2	48	45.6
Revenue to lines west	21.8	21.8	39.5	49.4
Anderson Scale for same haul in N. E.	91.5	91.5	91.5	91.5
Per cent. of N. E. Division to Anderson Scale	57	57	53	49.8
Per cent. of revenue west to local rate west	62.3	47.4	54.8	63.7
Amount to N. E. in excess of mileage prorate	19.7*	2*	2.5*	5.4*

*Less than mileage prorate.

It will be noted here that in every instance the New England Lines receive less than a mileage prorate; and this in spite of the fact that they perform the expensive floatage service between Harlem River and Jersey City; in spite of the two-line haul in New England; and in spite of all the other disadvantages of the New England Lines.

We again call attention to the fact that the New England Lines receive barely half of the Anderson Scale.

The inadequacy of the Baltimore and Washington divisions to the New England Lines is explained in part by the fact that on traffic to those points

the Pennsylvania arbitrarily deducts 3 cents per 100 pounds for the benefit of the Union Railroad at Baltimore. In this connection it will be noted that the New England Lines actually receive less revenue in cents per 100 pounds out of traffic to Baltimore and Washington than they receive out of the much lower rates to Newark and Philadelphia. We do not recall that any justification for this anomalous situation was given by the Trunk Lines, nor can we think of any justification that could possibly be given. It should be stated that the Baltimore & Ohio also deducts 3 cents on Baltimore and Washington traffic—just because the Pennsylvania does so.

There is a heavy volume of traffic between Boston & Maine stations and points in Trunk Line Territory. Fitchburg and Boston are typical New England stations, and Scranton, Allentown, Altoona and Syracuse are typical Trunk Line points. The following table, taken from Exhibit 43, shows the rates and divisions between Fitchburg and these points *via* Jersey City:

Between Fitchburg and	Scranton.	Allentown.	Altoona.	Syracuse.
Mileage in New England	232	232	232	159
Mileage west	191	89	320	119
Through rate (1st class).	80.5	74	101.5	80.5
Revenue to N. E. Lines	46.7	53.3	46.4	50.5
Revenue to lines west	33.8	20.7	55.1	30
Anderson Scale for same haul in N. E.	88	88	88	76.5
Per cent. of N. E. Division to Anderson Scale	53.1	60.6	52.8	66
Per cent. of revenue west to local rate west	45.7	37.3	59.2	57.1
Amount to N. E. in excess of mileage prorate	2.5	.2*	2.8	4.5

*Less than mileage prorate.
†*Via* Rotterdam.

Again we direct attention to the fact that the New England Lines are obliged to accept much less than the Anderson Scale as their proportion. The sacrifice which this entails may be appreciated by taking the Scranton divisions as illustrative. The joint haul of the Boston & Maine and the New Haven from Fitchburg to Jersey City is 232 miles. The Anderson Scale for this distance is 88 cents. On a carload of first-class freight weighing 24,000 pounds the New England Lines would receive under the Anderson Scale for this haul $211.20. For the same identical haul on interchange traffic consigned to Scranton they are obliged to accept $112.08; or $99.12 less than they receive for performing the same service in New England under the Anderson Scale. To sacrifice such a large sum on every carload of first-class freight that moves means a total loss that is very large in the aggregate. *We are not unmindful of the fact that carriers participating in a joint rate must ordinarily accept somewhat less than their full local as their proportion, and it is not our position in this case that the joint rates should be constructed by full combination on the Hudson River gateways. But we do contend that it is wholly unreasonable, in view of the very great cost of operating in New England* and the operating handicaps above mentioned, to require the New England Lines to shrink their revenues from $211.20 per car to $112.08 per car. There is no doubt whatever that this shrinkage is in large part responsible for the financial predicament of the New England carriers at the present time.

There is a substantial movement of freight between points in New England and points in Central Freight Association Territory. The following table, from

Exhibit 43, similar to those above, shows the rates and divisions on traffic from Boston to typical points in Central Freight Association Territory *via* Rotterdam Junction:

From Boston to	Chicago.	St. Louis.	Indianapolis.	Cincinnati.
Mileage in New England	209	209	209	209
Mileage west	810	989	737	715
Through rate (1st class)	157.5	184	146.5	137
Revenue to N. E. Lines	32.4	31.7	32.5	31.6
Revenue to lines west	125.1	152.3	114	105.4
Anderson Scale for same haul in N. E.	86	86	86	86
Per cent. of N. E. Division to Anderson Scale	37.7	36.9	37.8	36.7
Per cent. of revenue west to local rate west	99.3	99.9	99.1	98.5
Amount to N. E. in excess of mileage prorate	.1	.3*	.1	.6

*Less than mileage prorate.

This table shows, in a way even more striking than the preceding tables, the unfairness of the divisions to the New England Roads. We would first direct attention to the fact that the lines west are *receiving on this traffic almost 100% of their full local rates.* This is *shown by the figures in the next to last line. The Boston & Maine, on the contrary, receives hardly more than one-third of the Anderson Scale.*

The through rate in each case is approximately 75% of the sum of the Anderson Scale and the local west of the Hudson. Assume, for the purpose of argument, that it would be fair for the carriers west of the Hudson River to receive 75% of their local rates, and that it would be fair for the New England Lines to receive 75% of the Anderson Scale. We do not concede that this would be fair in view of the much higher costs in New England, but we shall assume that it is fair for the purpose of this illus-

tration. The revenue to the Boston & Maine on this traffic would then be 64.5 cents,—*an increase in the existing divisions of 100%!*

The distance from Boston to Rotterdam Junction is 209 miles. For this haul in New England the Boston & Maine would receive, under the Anderson Scale, 86 cents, which would yield on a car of first-class freight weighing 24,000 pounds, a revenue of $206.40. For the same service on this interchange traffic from Boston to Chicago the Boston & Maine receives 32.4 cents, or $77.76 per car. Stated in another way, the Boston & Maine receives 165% more revenue for a local haul in New England than it receives for the same service on this interchange traffic, whereas the lines west of the Hudson River, enjoying a long haul of about 800 miles, receive 100% of their full local rates.

The following table, taken from Exhibit 43, shows the same situation with regard to the rates from Greenfield to the same points *via* Rotterdam Junction:

From Greenfield to	*Chicago.*	*St. Louis.*	*Indianapolis.*	*Cincinnati.*
Mileage in New England	103	103	103	103
Mileage west	810	989	737	715
Through rate (1st class).	157.5	184	146.5	137
Revenue to N. E. Lines	32.4	31.7	32.5	31.6
Anderson Scale for same haul in N. E.	66.5	66.5	66.5	66.5
Per cent. of N.E. Division to Anderson Scale	48.7	47.7	48.9	47.5
Per cent. of revenue west to local rate west	99.3	99.9	99.1	98.5

Here again it will be seen (see figures in last line) that the lines west of the Hudson receive close to 100% of their full local rates, whereas the Boston & Maine must be content with less than 50% of the Anderson Scale.

We insist that it would be fair in this and similar instances, in view of the fact that the haul west of the Hudson is eight times as long as ours, in view of the fact that our haul is scarcely more than 100 miles, and in view of the much more expensive cost of operation in New England, to give the New England carrier a division that would approximate its full local rate. In any event it is manifestly unfair to give the Trunk Lines substantially their full local and ask the New England Lines, with their much greater operating costs, to rest content with less than half the Anderson Scale.

New Haven Divisions.

The following table, taken from Exhibit 52, shows the rates and divisions from typical stations on the New York, New Haven & Hartford Railroad to Philadelphia, Pa., *via* Jersey City:

To Philadelphia from	Boston.	Fall River.	Hartford.	Winsted.
Mileage in New England	229	222	127	134
Mileage west	99	99	99	99
Through rate (1st class)	74	74	63	63
Revenue to N. E. Lines	52.1	58.8	35.7	44.8
Revenue to lines west	21.9	15.2	27.3	18.2
Anderson Scale for same haul in N. E.	87.5	87.5	70.5	73
Per cent. of N. E. Division to Anderson Scale	59.5	67.2	50.8	61.4
Per cent. of revenue west to local rate west	45.4	33	59.3	39.6
Amount to N. E. in excess of mileage prorate	0.5	7.6	0.2	8.6

It will be noted that the New Haven, whose operating conditions are among the most difficult in New England, receives in two instances practically a mileage prorate, in spite of the fact that it performs the expensive floatage service between Harlem River and the Jersey shore.

The following table, from Exhibit 52, shows the percentages of the Anderson Scale which the New Haven receives on traffic from Boston, Hartford and Fall River to typical points in Trunk Line Territory:

To	From Boston.	From Hartford.	From Fall River.
Rochester	38.5	48.9	46.1
Buffalo	45.1	56.2	54.4
Altoona	53	65.8	62.6
Harrisburg	53.4	66.2	60 6
Pittsburgh	44.6	56.7	54.1

We have stressed elsewhere the great operating difficulties of the New Haven, its short haul, the large amount of branch line service, and the expensive character generally of its service. It goes without saying that the New Haven cannot afford to accept approximately one-half of the Anderson Scale on its interchange traffic. That it is required to do so explains in part the figures shown elsewhere in this brief indicating that the New Haven's ton-mile earnings on interchange business are only about one-third as high as its ton-mile earnings on interline business in New England.

The following table, taken from Exhibit 52, shows the rates and divisions from typical New Haven points to Louisville, Ky., and St. Louis:

	Boston.		Fall River.		Hartford.	
	L'ville.	St. L.	L'ville.	St. L.	L'ville.	St. L.
Mileage in New England	252	252	245	245	139	139
Mileage west	936	1114	936	1114	936	1114
Through rate (1st class)	157.5	184	157.5	184	157.5	184
Revenue to New Haven	37.4	36.5	41.6	40.1	33.2	32.5
Revenue to lines west	120.1	147.5	115.9	143.9	124.3	151.5
Anderson Scale for same haul in N. E.	91	91	89.5	89.5	73	73
Per cent. of N. E. Division to Anderson Scale	41	40.1	46.5	44.8	45.5	44.5
Per cent. of revenue west to local rate west	76.2	79.6	73.6	78.2	78.9	82.3

We particularly call attention to the fact that the New Haven, with a haul only one-fourth as long as that west of the Hudson, and laboring under all the other disadvantages mentioned elsewhere in this brief, receives as its divisions less than 45% of the Anderson Scale, whereas the lines west, with a long haul and with much more favorable transportation conditions, are given more than 75% of their full local rates.

Other typical divisions of the New Haven follow (taken from Exhibit 52):

	Washington, D.C. (*via* Jersey City, P. R.R.), and Boston.	Fall River.	Hartford.	Winsted.
Total mileage	471	464	369	376
N. E. mileage	229	222	127	134
Mileage west	242	242	242	242
First-class rate	95	95	95	95
N. E. Division	46.9	57.8	33.1	47
Division west	48.1	37.2	61.9	48
Anderson Scale	87.5	87.5	70.5	73
N. E. per cent. of Anderson Scale	53.6	65.9	47	64.4
Per cent. of local west	62.1	48	79.9	61.9

	Boston.	Buffalo and Fall River.	New Bedford.	Hartford.	Stamford.
Route	1	1	2	1	3
Total mileage	626	319	528	513	445
N. E. mileage	252	245	52	139	109
Mileage west	374	374	476	374	336
First-class rate	93	93	93	93	93
N. E. Division	41	48.7	31	41	38.7
Division west	52	44.3	62	52	54.3
Anderson Scale	91	89.5	55.5	73	66.5
N. E. per cent. of Anderson Scale	45.1	54.4	55.9	56.2	58.2
Per cent. of local west	60.5	51.5	66.7	60.4	58.4

1—Campbell Hall—Erie
2—Framingham—B. & A., N. Y. C.
3—State Line—B. & A., N. Y. C.

	Boston.	Fall River.	Hartford.	Winsted.
PITTSBURG (*via* Jersey City, P. R.R.) and				
Total mileage	665	658	563	570
N. E. mileage	229	222	127	134
Mileage west	436	436	436	436
First-class rate	101.5	101.5	101.5	101.5
N. E. Division	39	47.2	40	39
Division west	62.5	54.3	62.5	62.5
Anderson Scale	87.5	87.5	70.5	73
N.E. per cent. of Anderson Scale	44.6	54.1	56.7	53.4
Per cent. of local west	66.1	57.5	66.1	66.1

	Boston.	Fall River.	Hartford.	Winsted.
CLEVELAND, OHIO (*via* Campbell Hall, Erie), and				
Total mileage	839	832	726	691
N. E. mileage	252	245	139	104
Mileage west	587	587	587	587
First-class rate	112	112	112	112
N. E. Division	41.7	47	38	38
Division west	70.3	65	74	74
Anderson Scale	91	89.5	73	66.5
N. E. per cent. of Anderson Scale	45.8	52.5	52.1	57.1
Per cent. of local west	62.7	58.0	66.0	66.0

	Boston.	Fall River.	Hartford.	Winsted.
INDIANAPOLIS (*via* Campbell Hall, Erie) and				
Total mileage	1147	1140	1034	999
N. E. mileage	252	245	139	104
Mileage west	895	895	895	895
First-class rate	146.5	146.5	146.5	146.5
N. E. Division	41.7	47	38	38
Division west	104.8	99.5	108.5	108.5
Anderson Scale	91	89.5	73	66.5
N. E. per cent. of Anderson Scale	45.8	52.5	52.1	57.1
Per cent. of local west	71.5	67.9	74.0	74.0

	Boston.	Fall River.	Hartford.	Winsted.
CHICAGO (*via* Campbell Hall, Erie) and				
Total mileage	1200	1193	1087	1052
N. E. mileage	252	245	139	104
Mileage west	948	948	948	948
First-class rate	157.5	157.5	157.5	157.5
N. E. Division	41.7	47	38	38
Division west	115.8	110.5	119.5	119.5
Anderson Scale	91	89.5	73	66.5
N.E. per cent. of Anderson Scale	45.8	52.5	52.1	57.1
Per cent. of local west	73.5	70.2	75.8	75.8

Maine Central Divisions.

A study of the Maine Central's divisions leads also to the conclusion that its divisions are wholly inadequate, as appears from Exhibit 45.

CLASS RATES AND DIVISIONS FROM LEWISTON, ME., TO SCRANTON.

Junction	Portland, Me. Mechanicville, N.Y.		Portland, Me. Maybrook	
Total mileage	494		586	
New England carriers	M. C.—Portland —B. & M.		M. C.—Portland —B. & M. No. Amp.—N. Y. N. H. & H.—C. N. E.	
Maine Central mileage	37		37	
Carriers west of Junction	D. & H.		L. & H. R.—Easton—C. N. J.	
Mileage west of Junction	198		205	
Classes	1st	6th	1st	6th
Through class rate	95.0	31.5	101.5	34.5
Ton-mile earnings on through rate	3.8	1.3	3.5	1.2
Revenue to Maine Central	18.8	7.3	15.8	6.5
Anderson Scale for like distance	56.0	15.5	56.0	15.5
Per cent. Maine Central Division to Anderson Scale	33.6	47.1	28.2	41.9
Revenue west of Junction	28.9	9.2	29.2	9.5
Class rate west of Junction	74.0	28.0	66.0	25.0
Per cent. revenue west of Junction to local rate	39.1	32.9	44.2	38.0
Amount in cents per 100 pounds accruing to Maine Central in excess of mileage prorate	9.2	3.4	6.3	2.6

CLASS RATES AND DIVISIONS FROM ROCKLAND, ME., TO PHILADELPHIA.

Junction	Portland, Me. Waverly Transfer, N.J.		Portland, Me. Communipaw, N.J.	
Total mileage	514		496	
New England carriers	M.C.—Portland —B. & M. No. Amp.—No. H. N. Y., N. H. & H.		M.C.—Portland —B. & M. Amp.—N.Y., N.H.& H.	
Maine Central mileage	86		86	
Carriers west of Junction	Penn. R.R.		C. N. J.—B'd Brook—P. & R.	
Mileage west of Junction	99		91	
Classes	1st	6th	1st	6th
Through class rate	114.0	38.5	114.0	38.5
Ton-mile earnings on through rate	4.40	1.50	4.60	1.60
Revenue to Maine Central	30.7	11.1	30.5	11.3
Anderson Scale for like distance	69.0	19.5	69.0	19.5
Per cent. Maine Central Division to Anderson Scale	44.5	56.9	44.2	57.9
Revenue west of Junction	17.1	5.5	16.8	5.5
Class rate west of Junction	46.0	20.5	46.0	20.5
Per cent. revenue west of Junction to local rate	37.2	26.8	36.5	26.8
Amount in cents per 100 pounds accruing to Maine Central in excess of mileage prorate	11.7	4.7	10.8	4.6

CLASS RATES AND DIVISIONS FROM BANGOR, ME., TO ALLENTOWN, PA.

Junction	Portland, Me. Communipaw, N.J.		Portland, Me. Mechanicville, N.Y.	
Total mileage	545		696	
New England carriers	M.C.—Portland —B. & M.—No. Amp.—N. Y., N. H. & H.		M.C.—Portland —B. & M.	
Maine Central mileage	137		137	
Carriers west of Junction	C. N. J.		D. & H.—Wilkesbarre—C. N. J.	
Mileage west of Junction	89		300	
Classes	1st	6th	1st	6th
Through class rate	114.0	38.5	114.0	38.5
Ton-mile earnings on through rate	4.2	1.4	3.28	1.1
Revenue to Maine Central	30.5	11.3	28.4	10.6
Anderson Scale for like distance	80.5	22.5	80.5	22.5
Per cent. Maine Central Division to Anderson Scale	37.9	52.0	35.3	47.1
Revenue west of Junction	16.8	5.5	47.8	15.6
Class rate west of Junction	55.5	21.0	74.0	28.0
Per cent. revenue west of Junction to local rate	30.3	26.2	64.6	55.7
Amount in cents per 100 pounds accruing to M. C. in excess of mileage prorate	1.9	1.6	5.9	3.0

In 74% of its joint rates shown with roads outside New England, and not including Canadian traffic, the Maine Central receives a smaller percentage of its authorized local rate by way of division than do its connections west of the Hudson.

In 7 instances out of 46 its divisions are actually less than a mileage prorate.

As shown above, on traffic from Lewiston, Me., to Scranton, Pa., the Maine Central receives as its division only 33.6% and 28.2% of the Anderson Scale *via* Mechanicville and Maybrook, respectively.

On traffic from Rockland, Me., to Philadelphia, *via* Waverly Transfer, N.J., three New England Lines (the Maine Central, the Boston & Maine and the New Haven) participate. In spite of this fact the New England Lines receive out of the first-class rate of $1.14 only 4.9 cents more than a mileage prorate, and out of a sixth-class rate they receive only 1.9 cents more than a mileage prorate.

Again, on traffic from Bangor, Me., to Allentown, Pa., *via* Communipaw, N.J., the same three New England Lines participate; yet they receive out of the first-class rate of $1.14 only 1.8 cents more than a mileage prorate, and out of a sixth-class rate of 38.5 cents they receive only eight-tenths of one cent more than a mileage prorate. The mere fact that three New England Lines participate in the traffic ought to result in much more favorable divisions than that, even if no consideration whatever is given to the other operating handicaps which we have shown to exist.

On traffic from Rumford, Me., to Chicago, *via* the Boston & Maine, the two New England Lines receive only 49.5% of the Anderson Scale, whereas the lines west receive more than 80% of their full locals.

We submit the above merely as illustrative of the unfairness of the divisions to the Maine Central. When it is considered that that carrier serves a

portion of New England where traffic is thin and where climatic conditions are unusually severe, it is apparent that liberal divisions must be accorded to enable the road to live. Even when tested by the old standards the Maine Central's divisions are as a whole less favorable than those of the lines west of the Hudson River.

Central Vermont Divisions.

The Central Vermont's divisions can in like manner be shown to be wholly inadequate (Exhs. 46–51).

INDIANAPOLIS (*via* G. T.—D. & T. S. L.—C., C., C. & St. L.) and

	Montpelier.	Sharon.	Palmer.	Willimantic.
Total mileage	1031	1079	1212	1247
N. E. mileage	98	146	279	314
Mileage west	933	933	933	933
First-class rate	153.5	153.5	153.5	153.5
N. E. Division	42.2	42.2	42.2	42.2
Division west	111.3	111.3	111.3	111.3
Anderson Scale	71.5	81.5	102.5	106
N. E. per cent. of Anderson Scale	59	51.8	41.1	39.8
Per cent. of local west	66.4	66.4	66.4	66.4

CLEVELAND, OHIO (*via* St. Johns, G. T.—N. Y. C.) and

	St. Albans.	Montpelier.	Sharon.	Palmer.
Total mileage	746	802	850	983
N. E. mileage	42	98	146	279
Mileage west	704	704	704	704
First-class rate	119	119	119	119
N. E. Division	34	34	34	38.2
Division west	85	85	85	80.8
Anderson Scale	58	71.5	81.5	102.5
N. E. per cent. of Anderson Scale	59.6	47.6	41.7	37.3
Per cent. of local west	55.9	55.9	55.9	53.1

PITTSBURGH, PA. (*via* Harlem River, P. R.R.) and

	St. Albans.	Mont-pelier.	Sharon.	Palmer.
Total mileage	879	825	775	642
N. E. mileage	443	389	339	206
Mileage west	436	436	436	436
First-class rate	101.5	101.5	101.5	105
N. E. Division	53.4	53.4	46.2	42
Division west	48.1	48.1	55.3	63
Anderson Scale	121.5	115.5	108.5	86
N. E. per cent. of Anderson Scale	44	46	43.6	51
Per cent. of local west	51	51	59	67

On traffic from St. Albans, Montpelier, Sharon and Palmer to Allentown, Pa., *via* Harlem River, a haul in which the New Haven also participates, the New England Lines receive substantially less than 75% of the Anderson Scale as their proportion of the first-class rates, and except from Sharon, the divisions accruing to the Central Vermont and the New Haven are approximately the same as a mileage prorate. To Scranton, Pa., the situation is about the same except that the percentages of the Anderson Scale accruing to the New England Lines are still smaller.

On traffic to Philadelphia, Baltimore and Washington the Central Vermont and the New Haven receive generally less than 70% of the Anderson Scale, and the divisions conform rather closely to a mileage prorate.

On traffic to Central Freight Association Territory the Central Vermont's divisions are relatively more favorable, but this is due to the fact that its haul on that traffic is very short. From St. Albans and Montpelier to St. John's, the junction point, the distance is less than 100 miles.

In this connection we wish again to point out that 71% of the Central Vermont's freight tonnage

is interchanged with Trunk or Canadian Lines (Exh. 15).

Rutland Divisions.

The divisions of the Rutland Railroad, when measured by the same standards as those above employed, lead to the inevitable conclusion that they are inadequate and unfair (Exh. 64).

Rutland and Burlington, Vt., are the two principal stations on the line of this road. New York City is one of the principal destinations. On traffic between Burlington and New York the Rutland Railroad receives as its division 62.2% of the Anderson Scale, whereas the New York Central Railroad receives 77.3% of its local rate. In this instance Chatham, N.Y., is used as the junction point. Where Troy is used as the junction point the haul is quite evenly balanced, the Rutland Railroad and the Boston & Maine enjoying a haul of 152 miles as compared with 147 miles for the New York Central. The two New England Lines receive for their joint haul less than 67% of the Anderson Scale, while the New York Central receives more than 78% of its local rate. In this instance the New York Central deducts an arbitrary allowance of 3 cents per 100 pounds for the terminal service at New York.

Between Rutland and New York the situation is about the same, the Rutland receiving in the neighborhood of 50% of the Anderson Scale, while the New York Central receives close to 70% of its local.

On traffic from Burlington to Newark, N.J., the Rutland receives only 38% of the Anderson Scale, while between Burlington and Philadelphia it re-

ceives 37%. On traffic from Burlington to Harrisburg, Pa., *via* Rutland, the Rutland receives 38% of the Anderson Scale, whereas the Delaware & Hudson and the Pennsylvania, for their share of the joint haul, receive 92% of their local rate.

On traffic from Rutland to Chicago, St. Louis, Indianapolis, Grand Rapids and Cincinnati the Rutland receives the following percentages of the Anderson Scale: 51.4, 52.2, 45.7, 50.3, 53.1.

The Rutland operates in a portion of New England and New York State where the operating conditions are unusually severe and where the volume of traffic offered is very light. Seventy-eight per cent. of its total freight tonnage is interchanged with the Trunk or Canadian Lines (Exh. 15). It should be obvious that under these circumstances this carrier cannot make a fair living out of divisions that are scarcely more than one-half of the local rates approved as reasonable for this territory by the Interstate Commerce Commission.

We show on the following pages illustrations from Exhibit 64 indicating the inadequacy of Rutland Divisions:

	Rutland (*via* Norwood, N.Y., and N.Y. Central) and				
	Chicago (M.C.) Westbound.	Chicago (M.C.) Eastbound.	St. Louis (Wab.)	Indianapolis (Erie)	Grand Rapids (P.M.)
Total mileage	997	997	1202	1069	881
N. E. mileage	200	200	200	200	200
West mileage	797	797	1002	869	681
First-class rate	147.5	164.5	174.5	136.5	135
N. E. Division	47.8	53.3	48.5	42.5	46.8
West Division	99.7	111.2	126.0	94.0	88.2
N. E. per cent. of Anderson Scale	51.4	57.3	52.2	45.7	50.3
Per cent. of local west	67.6	67.6	72.2	68.9	65.3

			Burlington and		
	New York City (N.Y.C.)	Philadelphia (P. R.R.)	Washington (B. & O.)	Pittsburg (P. R.R.)	Pittsburg (P. R.R.)
Junction:	Chatham.	Rutland.	Rutland.	Jersey City.	Norwood.
Total mileage	318	532	642	767	667
N. E. mileage	182	67	67	331	133
West mileage	136	465	575	436	534
First-class rate	99.5	99.5	121	119	99.5
N. E. Division	56.6	24.9	30.3	62.6	45.1
West Division	42.9	74.6	90.7	56.4	54.4
N. E. per cent. of Anderson Scale	62.2	38.3	46.6	56.4	56.0
Per cent. of local west	77.3	100.8	95.5	59.4	53.6

	Scranton (C.N.J.)	Sayre (L.V.)	Rutland and Harrisburg (P. R.R.)	Buffalo (N.Y.C.)
Junction:	Chatham.	Mechanicville.	Mechanicville.	Troy.
Total mileage	474	271	415	387
N. E. mileage	114	82	82	85
West mileage	360	189	333	302
First-class rate	80.5	81	74	93.5
N. E. Division	27.7	32.2	25.1	36.5
West Division	52.8	48.8	48.9	57
N. E. per cent. of Anderson Scale	36.7	47.7	37.2	54.1
Per cent. of local west	65.6	77.5	66.1	79.2

Transcontinental Divisions.

The inadequacy of the New England divisions on transcontinental traffic is clearly shown in Exhibit 44. This is a heavy line of traffic, and by far the greater part of it moves to and from Boston as the great New England shipping and distributing centre (Rec. p. 280). The Exhibit shows rates and divisions on the following typical commodities:

Eastbound.

Apples	from	Seattle.
Apples	"	Spokane.
Canned fruits	"	San Francisco.
Canned salmon	"	Seattle.
Hides	"	San Francisco.
Lemons	"	Los Angeles.
Lumber	"	Seattle.
Lumber	"	Spokane.
Oranges	"	Los Angeles.
Wool in grease	"	Seattle.

Westbound.

Automobile tires	from	Boston.
Boots and shoes	"	"
Cotton goods	"	"
Dry goods	"	"
Oil-stoves	"	"
Patent medicines	"	"

Exhibit 44 shows 45 rates between B. & M. points and transcontinental points *via* Rotterdam Junction and the New York Central to Chicago. As this exhibit deals exclusively with commodity rates it does not show comparisons of the divisions with local class rates.

The participating carriers receive less than a mileage prorate in the following instances:

B. & M. 23
N. Y. C. 41
Western roads 5

The average hauls in miles are:

B. & M. 200
N. Y. C. 810
Western roads 2196

The average ton-mile earnings are:

B. & M. $0.01758
N. Y. C. $0.01415
Western roads $0.01732

The average revenues per hundred pounds are:

B. & M. $0.1753
N. Y. C. $0.5740
Western roads $1.9151

Exhibit 52 shows 60 rates between New Haven and C. N. E. points and transcontinental points. In every one of these the New Haven receives a smaller percentage of its local rate than do its Western connections, and in 17 it receives less than a mileage prorate. The average hauls are, New Haven and/or C. N. E. 152 miles, connections about 3,300 miles.

Exhibit 50 shows 60 rates from Central Vermont points to transcontinental points. In exactly half of them the Central Vermont receives a smaller percentage of its local rate than do its connections, and in 22 cases it receives less than a mileage prorate. The average haul of the Central Vermont under these rates is 176 miles; that of its connections over 3,000 miles.

Exhibit 45 shows 4 rates between Bangor, Me., and Seattle. In every case the New England carriers

receive a smaller percentage of their local rates than do their connections, and in 3 cases the New England carriers get less than a mileage prorate, though their average haul is but 388 miles, compared to over 3,100 miles for their connections.

TRANSCONTINENTAL RATES.

	Apples Seattle to Boston.	Canned Fruits San Francisco to Boston.	Canned Salmon Seattle to Manchester, N.H.
Total mileage	3227	3280	3226
N. E. mileage	209	209	208
N. Y. C. mileage*	810	810	810
Miles west of Chicago	2208	2261	2208
Rate (cents)	166.5	120.5	116.5
N. E. Division	8.57	6.2	9.21
Ton mile entire haul (cents)	1.03	0.735	.722
Ton mile N. Y. C.	0.816	0.59	.492
Ton mile N. E.	0.82	0.6	.886
Ton mile west of Chicago.	1.13	0.8	.79
Per cent. of miles in N. E.	6.48	6.37	6.45
Per cent. of rate to N. E.	5.15	5.18	7.91

TRANSCONTINENTAL RATES.

	Green Hides San Francisco to Boston.	Wool in Grease Seattle to Boston.	Boots & Shoes Manchester, N.H. to Los Angeles.
Total mileage	3280	3227	3249
N. E. mileage	209	209	208
N. Y. C. mileage*	810	810	810
Miles west of Chicago	2261	2208	2231
Rate (cents)	166.5	166.5	573.5
N. E. Division	8.57	8.57	43.3
Ton mile entire haul (cents)	1.015	1.032	3.53
Ton mile N. Y. C.	0.827	0.816	2.83
Ton mile N. E.	0.832	0.82	4.16
Ton mile west of Chicago.	1.14	1.13	3.57
Per cent. of miles in N. E.	6.37	6.48	6.4
Per cent. of rate to N. E.	5.15	5.15	7.56

*From Chicago to Rotterdam Junction.

TRANSCONTINENTAL RATES.

	Dry Goods Manchester to Los Angeles.	Sewing Machines Boston to Los Angeles.
Total mileage	3249	3250
N. E. mileage	208	209
N. Y. C. mileage*	810	810
Miles west of Chicago	2231	2231
Rate (cents)	625.5	308.5
N. E. Division	43.3	15.1
Ton mile entire haul (cents)	3.85	1.9
Ton mile N. Y. C.	2.81	1.44
Ton mile N. E.	4.17	1.45
Ton mile west of Chicago	4.19	2.10
Per cent. of miles in N. E.	6.4	6.43
Per cent. of rate to N. E.	6.9	4.9

It appears from the exhibit that on all this traffic moving between Boston and the principal transcontinental points the divisions accruing to the Boston & Maine are in all cases less than a mileage prorate. It should be pointed out in this connection that the lines in Trunk Line and Central Freight Association Territories also receive on this traffic less than a mileage prorate, indicating that the inadequacy of the divisions accruing to the Boston & Maine is in part due to the unduly large portion accruing to the lines west of Chicago. It will be noted, however, that the ton mile revenues accruing to the Boston & Maine are in most cases but a fraction of a mill more than the revenues accruing to the other lines east of Chicago. This indicates that while the divisions accruing to all lines east of Chicago on this traffic may be inadequate, the amount accruing to the Boston & Maine is relatively even less favorable than that accruing to the Trunk Line and Central Freight Association carriers.

*From Chicago to Rotterdam Junction.

Bearing in mind that the Boston & Maine Railroad on this heavy movement of traffic receives less per ton mile than the Transcontinental Roads and about the same as the lines east of Chicago, it is important to observe that the average haul of the Boston & Maine is slightly in excess of 200 miles, while the haul from Chicago to the Hudson River is in excess of 800 miles and the haul from the Pacific Coast points up to Chicago is in excess of 2,000 miles. We cannot too strongly emphasize the fact that the inadequacy of the Eastern Roads' divisions on transcontinental traffic is admitted by the defendants. Both New England witnesses and Trunk Line witnesses testified that divisions east of Chicago were unfair and inadequate, but the Transcontinental Lines made no reply.

Divisions on Southern Traffic.

We have shown that the specifics of the Northern Lines on traffic to and from points south of the Ohio River and the Virginia cities have not been increased 40% following the Commission's decision in *Ex parte 74* (Rec. pp. 518-20). It has been estimated that this results in a loss of $43,000,000 annually to the Northern Lines. The Commission having granted an increase of 40% to the Eastern Lines, it is wholly unreasonable to require them to accept an increase of but 33⅓% in their divisions on interterritorial traffic; nor is it fair that the Southern Lines, to which the Commission awarded 25%, should demand a 33⅓% increase in their divisions on this traffic. Fairness demands a revision of these divisions in harmony with the findings of the Commission in *Ex parte 74*.

Terminal Arbitraries.

At many points on the Maine Central and Boston & Maine Railroads the divisional arrangements have allowed these New England Roads an arbitrary deduction of one cent per hundred pounds before prorating the balance of the revenue*; but no increases have been allowed in this arbitrary on account of the advances in rates which have taken place since its establishment more than twenty years ago. The Maine Central and Boston & Maine have insisted that a divisional arbitrary of this character should be increased in the same percentage as rates are increased, but their connections, defendants in the proceeding before the Commission, have declined to accept this view (Rec. pp. 266, 587).

The correctness of the claim of the Boston & Maine and Maine Central in this respect can hardly be questioned. It would seem apparent that in the case of any divisional arbitrary, whether called a terminal deduction or otherwise, if the rate is increased and the arbitrary is not advanced in the same proportion, the carrier receiving the arbitrary does not get its just proportion of the increased rate. There is a clear demonstration of this fact in an illustration used by Mr. Eaton on page 886 of the Record. Moreover, the principle now urged by the Boston & Maine and Maine Central was expressly approved by the Commission in its report in *Ex parte 74:*

> "In many cases divisions between carriers are in the form of specific amounts per unit. It is obvious that unless divisions of this char-

*These terminal deductions have never been allowed at Boston and other points on the Boston & Maine's Fitchburg Division.

acter be increased, such lines will receive no benefit from the increases herein approved, while the other carriers will receive more than the respective percentage increases applicable to the traffic. It is concluded that where carriers earn specific amounts as their compensation out of through rates or fares, such amounts should be increased in the same percentages as the through rates or fares."

In the Matter of the Applications of Carriers, etc., 58 I. C. C. 220, 254.

New England Divisions as a Whole.

The divisions received by the New England Roads are inadequate even when tested by the standard of mileage. We have pointed out above that in a great many cases the New England Roads receive actually less than a mileage prorate and in a great many more cases they do not receive more than a fraction of a cent per hundred pounds above the mileage prorate. It has always been recognized, even on the theories applied before the enactment of the Transportation Act, that a mileage prorate was not the only test for divisions. In many cases the Commission has decided that other factors must be considered which may entirely offset mileage. Terminal service, length of haul, traffic density, operating conditions, large return movement of empty cars,—all of these and many other considerations have been held to be controlling in the establishment of divisions. (See, for example, *Low Moor Iron Company* v. *C. & O. Ry. Co.*, 42 I. C. C. 221; *Star Grain and Lumber Company* v. *A., T. & S. F. Railway Company*, 14 I. C. C. 364; *Louisville Board of Trade* v. *I. C. & S. T. Co.*, 34 I. C. C. 640;

Hayden Brothers Company v. *D. & S. L. R.R. Co.*, 45 I. C. C. 236; *Investigation of Alleged Unreasonable Rates on Meats, etc.*, 23 I. C. C. 656; *B., A. & A. Railroad Company* v. *B. & S. R.R. Corp.*, 31 I. C. C. 583; *Sloss-Sheffield Steel and Iron Company* v. *L. & N. R.R. Co.*, 35 I. C. C. 460.)

By the same reasoning the exhibits introduced by the defendants to show the effect of readjusting divisions to the basis of 50-mile blocks and 50-mile terminals prove that the present divisions of the New England Roads are inadequate. As we show below, an analysis of these exhibits indicates that in a considerable number of cases, and most of them rates on heavy traffic routes, the New England Roads would actually receive larger divisions on the proposed basis than they now receive. Here again, if we consider the other factors to which the Commission has always given weight in establishing divisions, it becomes evident that the present divisions are inadequate.

We have also shown that a comparison of the divisions east and west of the Hudson with the authorized local rates indicates that the New England Roads actually receive a smaller proportion of their local rates than do their connections in a large majority of cases. The local rates were established under the direction of the Commission and are therefore to be considered as a fair indication of what is required to meet the needs of the Roads. That group of roads which receives the smaller proportion of its local rates by way of divisions clearly receives less than its fair share of those divisions.

We therefore claim with respect to the New Eng-

land Roads' divisions as a whole that they now are entirely unfair and inadequate even when judged by the former standards.

Several of the defendants presented exhibits showing how the present divisions of through rates would be changed if all the New England joint rates were based on 50-mile division blocks for all participating carriers (or in some instances actual mileage to intermediate carriers) with the allowance of an extra 50-mile block to each terminal carrier (Penn. Exhs. 70, 156; Erie Exhs. 73, 158; D. & H. Exh. 82; C. R.R. of N. J. Exhs. 90, 91; N. Y. C. Exh. 157; C. C. C. & St. L. Exh. 159; N. Y. C. & St. L. Exh. 160; Mich. C. Exh. 161; Wabash Exh. 162; Pere Marquette Exh. 163).

Exhibit 70, page 1, is an analysis of fifty rates between New Haven points and Pennsylvania points. It shows that if the 50-mile blocks and 50-mile terminal allowance basis were substituted for the present divisions, the New Haven would get larger divisions than at present in twelve instances, provided the 60-mile allowance for New York Harbor service or the 4-2 Str. Maryland deduction were maintained. Eight of the twelve instances are Boston rates, and comprise eight of ten Boston rates shown. The other four are Hartford rates to Philadelphia and Baltimore. Even without maintaining the Harbor or Str. Maryland allowance, the four Hartford divisions would be increased to the New Haven.

Exhibit 70, page 2, shows a similar analysis of 60 Boston & Maine-Pennsylvania rates. Fourteen of them would show increased divisions to the New England carriers if the change were adopted, 8 of

them being Boston rates and 6 Fitchburg. The New England Roads' divisions of the eight Boston rates would be increased even if the Harbor and Str. Maryland allowances were not maintained.

Exhibit 82 shows 980 joint rates, counting eastbound and westbound separately, between Boston & Maine points and those on the Delaware & Hudson, Erie and Pennsylvania. Of these the Boston & Maine would get larger divisions on 193 on the 50-mile block plus 50-mile terminal basis. On 220 the Boston & Maine's divisions would be increased on that basis without the 50-mile terminal allowance.

Arbitraries allowed in certain instances to the Boston & Maine, the Maine Central and the New Haven were established many years ago and reflected in part the then cost of service borne by the New England Lines in conducting the interchange business, although these arbitraries are not so large as those allowed the Pennsylvania and New York Central on their main lines. But it is significant that none of these New England arbitraries have been increased in consequence of any of the rate increases. As stated above, the one-cent arbitrary on the Boston & Maine system other than on its Fitchburg Division has never been increased; the two-cent arbitrary allowed the Maine Central on certain of its traffic has never been increased; the arbitrary allowed the New Haven for the floatage service across New York harbor, established nearly fifty years ago, has never been increased; while the record is replete with evidence that the cost of performing such service has constantly increased. These arbitraries constituted an important part of the compensation received by the New England carriers in

respect of their terminal characteristics. The Commission has recognized in its decision in

Proposed Increases in New England, 49 I. C. C. 421,

the just claim of the New England roads to higher local rates inside New England and it increased class rates and commodity rates based upon class rates 10% as far back as 1917. This increase was justified by unusual burdens due to New England's terminal characteristics and situation, but such increased burdens have never been reflected in any increase in the divisions on through business.

As we have pointed out elsewhere, 80% of the New Haven's revenue ton miles is interchanged business. Only 54% of its gross revenue is derived from that source. Seventy-eight per cent. of the tonnage of the Rutland is interchanged business, which produces only 67% of its revenue. Ninety-six per cent. of the Central New England's business is interchanged business, which produces only 94% of its revenue. Sixty-four per cent. of the total tonnage of the New England Roads is interchanged with Trunk or Canadian Lines and from it we receive only 55% of our total freight revenue.

We have shown that the rate received by the New Haven on its interchange tonnage is one-third of that which is received on its intra-New England tonnage and one-fourth of that which it receives on its local tonnage, and that it is nearly one-fourth less than the average cost of all its freight. We have shown that the passenger traffic of the New England Roads is more remunerative than their freight traffic.

We therefore submit that the reason why the

New England Roads are failing to earn as much as they spend is more largely due to freight than to passenger traffic and is chiefly due to that part of their freight traffic which is interchanged with their western connections. The fact that those three New England Roads which interchange the largest proportions of their business with Trunk Line or C. F. A. carriers are unable to support themselves is clear proof that the revenues received on that business are inadequate.

We confidently submit that the Commission was amply justified in its report and order of January 30, 1922.

III.

CONTENTIONS IN APPELLANTS' BRIEF.

The brief filed by appellants with this Court contains no new arguments in addition to those heretofore presented both to the Interstate Commerce Commission and to the District Court. Its contentions may be summarized under the following heads:

1st. That the Commission by making its first report estopped itself from reconsidering the evidence and the law and making a different order upon the same evidence.

2d. That the Commission acted improperly in so interpreting the 1920 statute as to permit it to consider the revenue needs of the participating carriers in determining a divisions case.

3d. That the Commission acted improperly in making a blanket order in a divisions case covering groups of carriers and treating certain of the divisions

of a joint rate without going into detail with regard to all of the divisions.

4th. That the Commission acted without evidence as to a large number of railroads and without sufficient evidence as to all of the respondents.

5th. That the order is improper because the Commission also provided for a comprehensive readjustment of the whole divisional structure.

The Commission's Two Reports.

The appellants' brief makes a great deal of the suggestion that the Commission made certain findings of fact in its first report which are alleged to be inconsistent with the order made on the basis of the second report. It is argued that no new evidence having been taken and the Commission by a majority report having once stated that certain evidence was not before it or that the evidence indicated certain facts could not thereafter without new evidence find that any relief was warranted. But the Commission after the reargument before it, reconsidered certain of its rulings of law and findings of fact in the first opinion and was persuaded that it had erred in respect of certain important principles and conclusions. The Commission in its first opinion had said:

> "If it had been clearly and definitely shown that particular divisions assailed were but fair compensation for the service performed when they were established and that since the establishment complainants have been subjected to relatively exceptional operating expenses of permanent character, some basis

> for an adjustment by us of the divisions of joint rates as between the several carriers participating therein would have been indicated if those exceptional expenses were reflected in the rates" (Rec. p. 93).

The Commission had also said in its first opinion:

> "The age of the divisions affords no presumption that they are unreasonable; it may be that they were too liberal originally. The record fails to show clearly that relatively the New England lines have had exceptional handicaps which their competitors have not encountered" (Rec. p. 92).

On reargument it was pointed out to the Commission and we now strongly urge upon the Court that while the age of the divisions affords no presumption that they are unreasonable, age does afford a very strong presumption that they were reasonable when established and if changed conditions have come into operation then such divisions are unfair and unreasonable. The complainants did not contend that age alone afforded a presumption of unreasonableness but they did contend that age afforded a presumption of reasonableness when they were established and that the new conditions showed that they were now unreasonable. The Commission had ruled that a rate in effect for many years must be presumed to be reasonable.

> *Youngstown Sheet & Tube Co.* v. *P. & L. E. Ry.*, 29 I. C. C. 428 at 437.
>
> *Chicago Switching Charges*, 28 I. C. C. 677 at 679.

This is also a well-established principle of law.

> *Hooker* v. *I. C. C.*, 188 Fed. 242 at 252.

In *Chicago Switching Charges* the Commission had also held that

> "where a particular rate has been in effect for several years the presumption is that it is a compensatory rate."

Both these presumptions the Commission declined to recognize in its first opinion but after reargument the Commission did recognize the soundness of these propositions and said at page 114 of the Record:

> "It is a reasonable assumption that until then [that is, the extraordinary changes in the past three years] it [that is, the system of divisions] produced on the whole results which were fair."

It was also pointed out to the Commission at reargument that the Commission itself in *Proposed Increases in New England* had said (see Rec. p. 49) in substance, that the transportation in New England was in many respects distinctive and attended with unusual difficulties and extraordinary expenses not the least of which was the heavy debit balance for *per diem* and that it was therefore unreasonable for the Commission to have intimated in its first opinion that the complainants had not been subjected to relatively exceptional operating expenses of a permanent character and that *per diem* could not be considered with reference to divisions. The Commission after rehearing was convinced that the New England Roads had suffered more severely by the increased burdens of the last few years than the roads west of the Hudson (see Rec. pp. 113 to 116 inclusive). The Commission in its first majority opinion had distinctly recognized this fact and on page 92 of the record they said,

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> "We permitted material increases in the class rates in New England, which reflected the terminal charactistics of their roads";

and at page 90 of the record they said,

> "The voluminous record upon which the case is submitted is replete with evidence of peculiar local conditions in New England and the consequent relatively higher cost of conducting services for which complainants allege they are not justly, reasonably, and equitably compensated, with the result that their financial needs are not met."

The majority opinion in the first instance declined to give any relief with respect to divisions on transcontinental rates although both the complainants and the Trunk Line defendants were in agreement and the evidence was conclusive that the divisions east of Chicago were inadequate. Yet the majority of the Commission found that this was of no probative force against the Transcontinental Roads, because they were not present at the hearing (Rec. p. 88). This seemed an extraordinary conclusion inasmuch as they had been made parties and served with process and could have been present but allowed the case to go by default. The Commission in its original majority opinion made much of a casual remark made by the witness Eaton to the effect that the blocking of the complainants' lines was a mess of inconsistencies. This could not fairly be taken as an admission on the part of the complainants, and it certainly was not an admission on the part of the complainants that the divisions as well as the blocking were a mess of inconsistencies. The statement of Mr. LaRoe with reference to the picture presented by the division exhibits (see Rec. p. 271)

is hardly fairly dealt with by the Commission in its first opinion. Mr. LaRoe also pointed out that the divisions must be dealt with as a whole. The same observation is true of the Commission's treatment of the testimony of the witness Eaton. While Eaton agreed that certain of the divisions might be fair, he stated emphatically that as a whole they were unfair (see Rec. p. 281).

The foregoing factors and others produced at the reargument lead the Commission to conclude that presumably the rates established by the 40% increase under *Ex parte 74* were compensatory; that presumably the divisions which had been in existence for many years had been fair; that extraordinary burdens had been thrown upon the complainants in the last three or four years; that the higher costs of rendering services in New England had been recognized by the Commission in granting increased local rates within New England; but that such higher cost had never been recognized by any readjustment of divisions and that therefore it was proper for the Commission, having recognized these factors which were shown by the original evidence as well as by a large number of findings in the original majority report, to take the step forward which it had in a way uncertainly refused to take when the case was first presented and grant the relief which the record justified.

We submit that nowhere in the Commission's first report does the Commission decide that it has no authority to make the form of order which it subsequently made. Even if it had so decided, however, there is nothing in the statutes or law relating to the authority of the Commission to pre-

vent it from changing its interpretation of a statute even where such change increases or decreases its own authority. In the very case relied upon by the appellants in the second section of their brief to show the extent of the Commission's jurisdiction over divisions prior to the 1920 statute (*Morgantown & Kingwood Divisions*, 40 I. C. C. 509; 49 I. C. C. 540), the Commission did this very thing. In the first of these two reports it determined that it had no jurisdiction over divisions which had not been established by itself. In the second report it reversed its earlier position.

Neither the appellants nor the Commission nor any court has cast any doubt upon the Commission's constitutional right to reinterpret its authority in this manner. The legal effect of the Commission's first report is of course nil. The Commission's order expressly makes the second report a part of itself. The effect of the first report is as though it had never been written. This court has said in

> *Manufacturers' Ry. Co.* v. *U. S.*, 246 U. S. 457, 482,

in referring to certain reports of the Commission,

> "It may be conceded that the evidence would have warranted a different finding; indeed the first report of the Commission was to the contrary; but to annul the Commission's order on this ground would be to substitute the judgment of a court for the judgment of the Commission upon a matter purely administrative, and this cannot be done."

Interpretation of the 1920 Statute.

The appellants argue at length that the amendments of the Interstate Commerce Act embodied in the Transportation Act of 1920 do not enlarge or change the Commission's jurisdiction over divisions. We have dealt with this subject at length in the earlier part of our brief (*supra*, pp. 11 to 22). We have also set forth in some detail the legislative history of the Act (Appendix A, *infra*). The District Court, in its decision in this case, said (Rec. p. 947):

> "The question before the Commission was the apportionment of the joint fund in proportion to the services rendered. In the past, the joint railroad service was largely measured by mileage performed by the participating carriers. This was then the way of expressing the relative burden incurred. It became apparent that other things measure the burden beside mileage and it was this increasing appreciation of these factors that led to the provisions of section 15, sub-division 6, indicating that mileage alone was not to be considered. . . . The Act makes it the Commission's duty to find a way despite the complexity of the subject, to carry out the new mandate of Congress and makes it clear that the matter must be dealt with in a comprehensive way."

As we have shown, public interest, the importance of the participating carriers and their revenue needs were not really considered by the Commission prior to the 1920 statute. In certain cases undoubtedly the Commission did refer to some of these factors in discussing divisions. Their consideration, however, was never mandatory prior to the 1920 Act nor were they ever given the importance, even in the cases

referred to by the appellants, which the 1920 Act requires that they receive.

Prior to 1920 mileage was the chief factor, in most cases the only factor. Since 1920, mileage, if it be considered at all, *must* by the terms of the statute be subordinated to the other factors enumerated.

Furthermore, the divisions provisions, as we have shown, are an integral part of the machinery for the distribution of the joint fund to be raised by the new rate-making sections. The rate-making provisions are new in the 1920 statute. The conception of a joint fund for the maintenance of the entire national railway system is new and the conception of machinery for distributing the joint fund is, therefore, also new. That is why section 15, paragraph 6 makes it mandatory instead of permissive to consider revenue needs, public importance, etc.

We do not claim, as the appellants' brief suggests, that a divisions case may be used as a pretext for transferring revenue. We have not based our case upon any such theory. If we had introduced no evidence concerning our divisions, we would admit the force of the appellants' argument, but we introduced not only evidence of financial needs, but also very full evidence of our divisional structure as a whole. That evidence shows that the divisions are myriad and in many respects illogical. It shows that in all probability there are some divisions which considered individually may have been fair to the New England Roads at the time of the hearings before the Commission, but it clearly demonstrates that the divisions of the New England Roads taken as a whole yield an insufficient revenue when considered in the light of the factors required by the Commission to be considered in determining divisions.

If it be granted, as we claim, that the Commission has power to deal with divisions in a group order, it must be admitted on the evidence before the Commission that the New England Roads have proved of record that their divisions are inadequate and that on the basis of the strictest theory of a divisions case they are entitled to an increase in their divisions. The appellants attempt to stigmatize the order by calling it a mere transfer of revenue rather than a divisions order. It should hardly be necessary to point out that every divisions order transfers revenue in the sense in which the appellants use the phrase. The order fixes the minimum divisions to be received by the New England Roads on the basis of a blanket minimum increase. If the blanket feature is not objectionable, there can be no other objection.

The appellants in their Fourth Point assert that the Commission worked backwards, that it first determined that the New England Roads needed money and then decided to grant them a certain amount of money by means of increased divisions. We, of course, cannot agree that this is what the Commission did. The Commission decided that the divisions of the New England Roads were inadequate. One of its reasons for so deciding was that the financial needs of the New England Roads which the statute required the Commission to consider in a divisions case justified those roads in receiving larger divisions. The appellants' brief, Point 4 (3), quotes from the report of the House Committee which dealt with the 1920 statute (66 Congress, 1st Session Report No. 456). The appellants expressly state that the only object of the House Bill in changing the divisions section was to give the Commission power to take the initiative in making divisions.

The incorrectness of this assertion is clearly indicated by the quotation which we give in Appendix A (*infra*, p. 180) from this same report, in which we show that the initiative in the Commission was expressly thought of by the Committee as being for the purpose of aiding "the short or weaker lines."

The appellants, recognizing the force of our argument, assert that if the statute means what we claim that it means and what the Commission and the District Court have said that it means, it is unconstitutional, because it takes property without due process of law merely because one carrier needs that property more than another. This contention, if carried to its logical conclusion, would require the Court to hold in a rate case that exactly the same rate must be prescribed by the Commission for one hundred miles' haul on every road in the country regardless of operating or financial conditions. If rates may be based upon the cost of the service and if the cost of service may include anything more than the mere length of haul, it is absurd to say that every road must have the same rate for the same haul or that every road must have the same divisions for the same haul. Appellants' argument would result in saying that rates cannot be changed relatively, even if relative conditions of operating cost, financial need, etc., undergo change.

If the Commission may adjust rates as circumstances vary, certainly it may treat divisions in the same way. If a joint rate is higher than it otherwise would be because of the disproportionate needs of one of the participating carriers, there can be no valid claim made that the property of the other carriers is being taken away from them if the excess in the

joint rate due to the first carrier's needs is turned over to that carrier.

The Commission's Discretion to deal with Groups.

We have demonstrated above (pp. 29 to 41) that the Commission has full discretion to deal with carriers in groups, to deal with joint rates between certain carriers or groups of carriers as a whole and to deal with certain divisions of a joint rate without going into the details of each one of its divisions. The appellants have urged nothing new in their brief in this matter. Their entire argument throughout the brief is based on the assumption that the Commission cannot deal with carriers or divisions in groups. When they alleged that there is no evidence concerning certain carriers or certain divisions this assumption is the basis for the allegation. When they allege that certain divisions are now fair and will be made unfair by a blanket order, again this assumption is at the basis of the allegation. The District Court dealt with this argument at length, notwithstanding the contention of the appellants that no reference is made to it in the opinion of the Court. The Court said (pp. 944 to 946 *passim*):

> "The petitioners attack the order of the Commission on the grounds that the Commission exceeded its authority in fixing primary divisions east and west of the Hudson River gateway without at the same time fixing the subdivision to be received by it of the two or more railroads participating in the haul on either side of the gateway and that the Commission exceeded its authority in the group treatment of divisions. . . . There is nothing contained in Section 15 (6) which prohibits the Commission

from dealing with the matter of divisions in a practical way and nothing which makes it mandatory upon the Commission at the same time to take up an unworkable task in thus dealing with all of the sub-divisions about which there may be no complaint whatever. This record has made it plain that the New England Group, so-called, presents a transportation situation in a district clearly separable from other districts by a variety of controlling conditions. The Commission had the power to deal broadly with the question of primary divisions at the Hudson River on through traffic between New England points and the rest of the country. Section 15 (6) authorizes the Commission to take up and deal with the question of this primary division at the Hudson River and does not compel the Commission at the same time to deal with all subdivisions. It was found in the past to be a reasonable and helpful practice on the part of carriers as well as on the part of the Commission to deal with divisions of through rates from one well-defined district of the country to another on the basis of the primary division at the gateway between the two districts. It is the practical way to deal with the situation in view of the various number of different routes. (*Pitts. & W. Va. R.* v. *Pitts. & L. E. Ry.*, 61 I. C. C. 272; *N. J., P. R. & T. Co.* v. *C. R.R. of N. J.*, 63 I. C. C. 80.)

We think that Section 15 (6) in effect does not require the Commission to make an independent conclusion as to each carrier and as to the division of each joint rate. If it considers together the various carriers and various divisions and reaches a conclusion equally applicable to such carriers and divisions, its order is valid and enforceable under the Act."

The Court further pointed out on page 947 of the record that the Commission's report clearly indicates its willingness to correct any injustice in detail which might arise from this comprehensive manner of dealing with the subject. The Commission has been given not only authority but the duty to administer the provisions of the Interstate Commerce Act. The details of its administration must necessarily be left to it to determine. Whether it will consider roads as a group or divisions as a group is an administrative detail of the sort always left to the discretion of an administrative tribunal.

If the Commission has discretion with regard to how many parts of a given railroad system it will include in its figures for that system, it must also have discretion to determine how many independent railroads it will include in a group for a specific purpose. We might point out that the appellants' brief in two different sections enumerates for various purposes a large number of specific railroads, many of which, as the Commission is well aware, are parts of other systems. We shall discuss this matter in more detail in referring to the sufficiency of the evidence before the Commission.

The appellants have alleged in their brief that this is the only divisions case in which the Commission ever made a group order. They have referred to the *Missouri and North Arkansas Case* and the *Orient Divisions Case*. We wish to point out that in these cases as well as the *East Jersey* and the *Pittsburg and West Virginia* cases the Commission made a blanket order affecting all the divisions of the respective complainants regardless of what carriers participated therein. While it may be that the complainants in

those cases did not constitute territorial groups of carriers, their divisions were dealt with in blanket fashion and the remainder of the joint rates after complainants' divisions had been determined were left to the participating carriers to divide as they should see fit.

Appellants claim that there was no Evidence to justify the Order.

The District Court discusses at some length the sufficiency of the evidence (Rec. pp. 940–949). On page 948 it expressly says:

> "We are satisfied that a reasonable investigation was made by the Commission finding that the existing divisions accruing to the New England lines were unjust, unreasonable and inequitable, and it was warranted in making its temporary order."

As we have pointed out above, evidence of financial needs, importance of the railroads, whether each road is an originating, intermediate or terminating carrier, and evidence of the other factors required by the new statute to be considered in determining divisions, is, all of it, divisions evidence. Prior to the 1920 statute this was not so, and the argument of the appellants which disregards this evidence is a clear indication that in spite of their contention concerning the jurisdiction of the Commission before 1920 the appellants are really living under the old system whereby the only admissible evidence in a divisions case was evidence of mileage or service rendered.

We have discussed at length in this brief the sufficiency of the evidence of all sorts which was introduced before the Commission. Even with regard

to the actual divisions themselves, we have shown (*supra*, pp. 105–110 and Appendix D *infra*) that there was ample evidence before the Commission. Appellants, however, reiterate again and again their statement that there was no evidence of the divisions received by certain railroads who are affected by the order. In Point 6, II of their brief they refer to the two hundred and fifty carriers as to which they allege there was no evidence concerning divisions. As we have stated above (p. 108), these carriers are located in distant territories. The New England Roads interchange no business and have no joint rates with the great bulk of them. Many of them are very unimportant and many of them are merely parts of other systems.

In the same section of appellants' brief there are further lists of carriers as to which it is alleged there is no divisions evidence. To illustrate the futility of this sort of argument we wish to point out with regard to some of the carriers in these lists the following facts:

The Bessemer & Lake Erie is a north-and-south line between Pittsburg and Lake Erie, cutting at right angles to any traffic to or from New England. It is owned by the United States Steel Corporation, which has always claimed that it is a mere plant facility and not a common carrier. The Chesapeake & Ohio interchanges practically no business with New England (Rec. p. 459). It is not true, however, that no evidence was introduced concerning its divisions. Appendix B to the New England Roads' complaint before the Commission as well as Exhibit 52 introduced by the New Haven show joint rates involving the Chesapeake & Ohio between New Orleans and five New England points. The Chicago & Alton, which

can hardly be said to be located "east of the Great Lakes and the Mississippi River" as alleged in appellants' brief, is included in joint rates set forth between St. Louis and New England points *via* the Central Vermont illustrated in Appendix B to the petitioner's complaint. The Cincinnati, Indianapolis & Western is jointly controlled through stock ownership by the Southern Railway and the Louisville & Nashville which in turn is controlled by the Atlantic Coast Line. The Detroit, Toledo & Irontown is involved in joint rates shown both in Exhibit 43 introduced by the Boston & Maine and in certain of the exhibits introduced by the C. F. A. Roads. The Hocking Valley is a part of the Chesapeake & Ohio system. The Kanawha and West Virginia is a part of the Toledo & Ohio Central which in turn is controlled by the New York Central, as is the Pittsburg & Lake Erie. The Atchison, Topeka & Sante Fe, the Great Northern, the Northern Pacific and the Southern Pacific are all referred to in the exhibits or Appendix B before the Commission. The Houston, East & West Texas is a part of the Southern Pacific.

With regard to the list of carriers shown in section 2 of the First Point of the appellants' brief the same sort of remarks apply:

The New York, Susquehanna & Western, for example, is owned by the Erie. The West Jersey & Seashore is owned by the Pennsylvania. The Central of New Jersey as is shown in the record (p. 613) is controlled by the Reading which in turn is controlled by the New York Central and the Baltimore & Ohio. The Lake Erie & Western is controlled by the New York Central.

We might carry this further and show that the

long lists of carriers referred to in appellants' brief as well as the affidavits introduced by them before the District Court mean very little when analyzed, because either the New England Roads do not interchange with them or there was evidence introduced or they are parts of other systems.

The "Temporary" Order.

Appellants attempt to make a great deal of the argument that even granting that the Commission has jurisdiction to make an order such as that here involved, it cannot make such an order for a limited period or pending a more complete readjustment of divisions. The absurdity of this argument hardly needs to be pointed out. If the Commission has jurisdiction to do a certain thing, that jurisdiction cannot depend upon its doing that thing on a permanent basis. If the Commission can establish divisions, it can establish them for a limited period. The fact that the Commission has also ordered the participating roads to revise their entire divisional structure certainly cannot cast any doubt upon the power of the Commission to make a divisions order pending such revision.

The District Court dealt with this subject. It pointed out on page 945 of the record that the order was attacked because it was made in contemplation of further revision of divisions. On page 947 it said,

> "Nor may just complaint be lodged against this order because it is temporary and provisional and represents a transfer of revenue pending the Commission's reaching a conclusion on the subject of divisions."

And on page 949 the Commission said,

> "We are satisfied that a reasonable investigation has been made which warranted the granting of the temporary order which is now complained of, and no valid reasons exist why this court should invalidate or modify this order."

Conclusion.

We have shown that the Commission had before it full evidence of the situation of the various participating carriers on all the subjects which the statute requires it to consider in determining their divisions. We have shown that the Commission's interpretation of the statute was that intended by Congress, that the Commission did not act arbitrarily or beyond its authority. We therefore submit that the District Court was justified in denying the petition for an injunction to restrain the enforcement of the Commission's order.

CHAS. F. CHOATE, JR.,
JAMES GARFIELD,
Of Counsel.

In Appendix A are excerpts from the Congressional Record bearing on the interpretation to be given the Transportation Act. Appendices B and C include various compilations from Exhibits before the Commission showing the inadequacy of the divisions received by the New England railroads. Appendix D shows the sufficiency of the evidence before the Commission with reference to existing divisions of joint freight rates. Appendix E shows how full and complete was the evidence in the record dealing with revenues, financial statistics and operating costs and conditions on the individual roads west of the Hudson River, together with especial references to the contentions of the Erie and the Central Railroad of New Jersey.

APPENDIX A.

LEGISLATIVE HISTORY OF THE ACT.

When it was suggested at the hearings before the Senate Committee that rates as a whole should be so made as to yield a fair return on the fair value of all railroad property, or all the railroad property in certain groups, it became apparent that the result would be most inequitable as between the several railroads in each group unless the law could be so drawn as to safeguard the interests of the weak railroads. In his testimony before the House Committee, Mr. Cain, representing the American Short Line Railroad Association, said (Vol. 2, Printed Record, p. 1873):

> "If you establish a rate structure based on the value of all of these properties, you must then take into consideration the location and every other fact that enters into the question as between the different roads. Else in any rate-making district you are merely creating a purse and throwing it out there in order that the strong and weak roads may wrestle for the purse. What is the undoubted result? The stronger road takes it and the weaker road grows weaker and the stronger road stronger. You cannot avoid it. I think that is the danger we have in front of us and that will bring us to Government ownership unless we can solve the problem in some equitable way."

Following Mr. Cain's statement the following colloquy took place (pp. 1873–4):

> "Mr. MONTAGUE. Your cure is a proper proportion or division of the rate?

Mr. CAIN. Yes, sir; and also a distribution of the traffic. . . . Now I do not see any chance for the weak or the short or producing line except through a division of the rate and a distribution of traffic.

Mr. MONTAGUE. Your plan is a division of the rates and a proper division of the rates as between the strong and weak lines?

Mr. CAIN. Yes, sir. . . .

Mr. MONTAGUE. You go back to the rate itself?

Mr. CAIN. We go back to the rate itself, what it costs to produce the transportation.

Mr. MONTAGUE. I understand the way you get at it, speaking broadly, you hope to cure the situation by equalization of the pay which the several roads get for hauling produce and mankind?

Mr. CAIN. Exactly. That is the fundamental.

Mr. MERRITT. Do you propose an amendment that would produce that result?

Mr. CAIN. Only this kind of an amendment, Mr. Merritt, giving the commission the power to establish routes, rates, and divisions, and telling them to exercise it.

Mr. SIMS. In other words, making it mandatory?

Mr. CAIN. Yes, sir."

House Bill No. 4378 was introduced by Representative Esch on June 2, 1919. The only change it proposed with respect to that portion of Section 15 of the Interstate Commerce Act which had to do with divisions was a revision so that beyond question the Commission was given authority to determine the reasonable proportion of a joint rate to be received by any carrier participating therein,

regardless of whether the joint rate was voluntarily established by the carriers or made effective as a result of an order by the Interstate Commerce Commission; also the Commission was given power to award reparation from the date of the filing of a complaint. There was *no broadening* of the language of the Act with respect to establishing a guide for the Commission to follow in determining what should constitute just and reasonable divisions. Senate Bill No. 2096, as originally introduced by Senator Cummins, contained provisions with respect to divisions almost identical with those contained in the House Bill introduced by Representative Esch.

The logical deduction from the foregoing seems to be that at the time of the original introduction of both the House Bill and the Senate Bill, the framers had in mind merely giving authority to the Commission over the division of all joint rates regardless of whether those rates were voluntarily established by the carriers or filed as a result of an order by the Commission, and somewhat broadening the date when the reasonable divisions established by the Commission could be made retroactively effective.

Hearings before the House Committee on interstate and foreign commerce were begun on July 15, 1919. On July 16 Chairman Clark of the Interstate Commerce Commission made the following statements (Vol. 1, Printed Record, pp. 29 and 30):

> "The next provision begins in line 3, page 24, of the committee print, line 1, page 24, of the bill, and refers to divisions of joint rates, fares or charges as between carriers parties thereto.

There has been a good deal of difference of opinion, both inside and outside of the Commission, as to its powers under the present act. The act now authorizes the Commission to establish joint rates and says that if the carriers are not able to agree on a division of the rates so prescribed, the Commission may determine those divisions and its decision relative thereto shall become effective as a part of the original order and as of the date upon which the rates became effective. But there have come up questions as to divisions of rates which had not been prescribed by the Commission and which had become unsatisfactory to one or possibly more than one carrier. The Commission originally held that it did not have jurisdiction to prescribe the divisions of a joint rate that had not been prescribed by it. Thereafter, the dissatisfied carrier could bring that question at issue by filing a revocation of its concurrence in the rates, or if it happened to be a carrier that published the rates, by filing a cancellation of them. That was frequently protested, often suspended by the Commission, and upon hearing it developed that the only difficulty was their differences as to divisions of the rates. Requiring them by order to continue the rates was, in effect, establishing those rates as joint rates, and we thereupon proceeded to prescribe the divisions, if they could not agree.

Later, by a majority vote, the Commission decided that it had power to prescribe the divisions, even if it had not prescribed the rates, but that has not as yet come to rest through any final adjudication.

Under this amendment the Commission would be authorized to prescribe the divisions of the joint rates, fares, and charges as between the carriers, whether it prescribed the rates

or not, and it is provided that if it be a rate, fare, or charge that has been prescribed by the Commission, it may then, by order, make its division of that rate retroactive to the date upon which the rate prescribed by it became effective; but as to rates not prescribed by the Commission, its order prescribing the divisions of the rate would be effective only from the effective date of the order."

On July 18, 1919, Chairman Clark made the following statements in answer to certain questions regarding the divisions sections as contained in the Esch Bill (Vol. 1, Printed Record, pp. 71, 72, 73):

"The CHAIRMAN. As to the division of rates in connection with short-line roads, would it be possible under the provisions of this bill to give power over the division of rates to adjust such division of rates as would permit the average short line to live?

Mr. CLARK. I would not be venturesome enough to say that it would be possible to permit them to live. Their conditions are varied. It would be possible to require what is not now always followed, that the so-called short-line roads shall have a reasonable and fair division of the rates. . . .

The CHAIRMAN. Would it be feasible or wise to give to the short lines a minimum percentage of the rate?

Mr. CLARK. No; I do not think so, Mr. Chairman, because it would follow that for identically the same service on a shipment which took a high rate it would get a very much larger division than it would get on a similar shipment which took a very low rate.

The CHAIRMAN. You think—I will not say generous treatment, but fair treatment should be given to the short line because it originates the freight?

Mr. CLARK. I think that fact should be a factor in determining how much it is entitled to."

On September 25, 1919, Chairman Clark, again testifying before the Committee, made the following statements (Vol. 3, Printed Record, pp. 2871, 2872):

"Mr. DENISON. Mr. Clark, as I understand your statement, you do not think it is wise policy to authorize the commission or give the commission any power to route through freight that is unrouted, in the interest of the carrier.

. . .

Mr. CLARK. I think it is not wise.

Mr. DENISON. Do you think it wise to give that power or authority to any other governmental agency?

Mr. CLARK. I should think it was an unsound policy to undertake as a Government undertaking.

Mr. DENISON. It has been suggested here, as I remember, not, of course, directly in the interest of what are called the weak roads, but their ultimate interest is the public interest, because it is to the public interest to help sustain the weak roads, and in that sense it would not be simply in the interest of a railroad.

Mr. CLARK. That seems to me to be cared for in a much more logical way by fixing fair divisions, taking into consideration the condition of the property, and fixing reasonable and fairly liberal through routes so that that road will have an opportunity to share in the traffic, and that on the traffic it does share in it will

get reasonable earnings. I think it is an unsound proposition as a governmental policy, as I shall say a little later, to take excess earnings of a prosperous road and give them to a less prosperous competitor. I think it is equally unsound and lacking in a moral sense to take tonnage away from a given railroad and give it to a competitor because that competitor would like to have it.

Mr. DENISON. Not because they would like to have it, but the question is whether it would be because it has to have it in order to keep going.

Mr. CLARK. Well, as I have said, I think that can be taken care of in other ways that are more practicable. I think, as I indicated when I was before the committee before, that there are some so-called weak roads that never can, by any, what I would call proper legislation, be made to go on the basis of their present financial condition. Many of these weak roads are weak because of their financing. Many of them are weak because of the staggering burden of fixed charges which, in many instances, doubtless are upon indebtedness that far exceeds the actual or true value of the property. I think that some reorganizations are necessary and inevitable.

Mr. DENISON. Speaking for myself, one of the most serious problems or difficult problems that confronts us is just how far we ought to go by legislation to help these weak roads and how we ought to do it, and I am asking the question for the purpose of obtaining your judgment.

Mr. CLARK. In a very general and abstract way, I would express my opinion in this way: When the Legislature has provided law which, when properly administered, will give a rail-

road all of the fair opportunity that it can rightfully demand and protect it against undue prejudice or unjust discrimination at the hands of stronger, competing lines, and that law has been administered in its full spirit, the Government has performed its full duty to that property. If the property cannot live under those conditions, some reorganization of its affairs is necessary."

And at pages 2878 and 2879:

"Mr. HAMILTON. This may be a matter that is entirely elementary to the other members of the committee, but I understand you to say that the commission has the power to establish divisions of rates, and to fix through routes where no agreement has been made. We have heard complaint after complaint here by short lines that they are utterly at the mercy of the trunk lines, that they are held in a pocket, so to speak, and that the trunk lines refuse to make agreements of fair division and refuse to route traffic. Is there any way of protecting the short line from the unconscionable performances of the stronger lines in cases where these complaints are well founded?

Mr. CLARK. I think that is quite generally and liberally provided for in the provisions of this so-called Esch bill.

Mr. HAMILTON. You think that fully covers it?

Mr. CLARK. I think it covers it as far as it can be covered by legislation.

Mr. HAMILTON. Very well, that answers my question."

In his testimony before the House Committee, Mr. Cass, representing the short lines, made a statement in which he gave a remarkably accurate

prophecy of the present plight of the New England railroads. The following is from pages 1909 to 1913 (Vol. 2) of the testimony before the House Committee:

> "Now, you make up several rate-making groups, for instance, and in those groups you take into consideration the value of all of the railroads in that group, and you form a rate level applying to the valuations of all of the railroads in the group. Therefore, if a rate level is made to produce a revenue of whatever figure may be determined upon to all of the railroads in that group, then the Interstate Commerce Commission should have the right, and it should be its duty, to so divide the revenues paid for the moving of freight in this group that every railroad whose property values have gone to make up the values of the railroads in that group should have its fair return upon the value of its property, and if the railroads do not agree upon among themselves as to what will be a fair division of that rate and that income, then the Interstate Commerce Commission should have the right to say what shall be a fair division and take into consideration the necessities of the various carriers in that group, in order that they may all be preserved to the interest of the public who are dependent upon them and may be caused to function and give a service that will meet the necessities of the public. . . .
>
> Mr. DENISON. Your idea is that the Interstate Commerce Commission or the other rate-making body must take into consideration in the division of rates the necessity of keeping a road going?
>
> Mr. CASS. Yes, sir.

Mr. DENISON. Regardless of whether or not the road actually earns that division?

Mr. CASS. Provided the road is necessary to the community. . . . It must not be allowed to lie there and the people be without service of any character. There is no other way to fix it but to give to the railroad such a division of the rate and such a division of the traffic as will make it possible to keep it going. . . . The amendment which was offered here by Mr. Cain yesterday we believe will accomplish—that is, we believe the commission may go far enough in their wisdom to accomplish that result if it is necessary that the road be kept going."

Mr. Luther M. Walter, representing the National Association of Owners of Railroad Securities, testified as follows at page 1009 of Volume 1:

"Then with the Commission in control of divisions, and with the movement of tonnage, it can still further increase the earnings of these weaker roads."

In the hearings before the Senate Committee on February 14, 1919, Mr. Freer, President of the National Industrial Traffic League, testified as follows (Vol. 1, p. 1187):

"The Commission should be given clear and complete authority to fix the divisions of joint rates, whether or not such joint rates were prescribed by the Commission. . . . We think it should be made clear that they have the authority to fix all divisions, and we believe that that authority, properly exercised by the Commission, would be of considerable assistance in connection with the so-called weaker roads."

Following the Committee hearings, Senate Bill No. 3288 was introduced by Senator Cummins on October 22, 1919, and revised December 15, 1919. In this bill the amendments *in re* divisions were materially changed from those set forth in his original bill of August 23, 1919, and are almost identically the provisions finally enacted in the Transportation Act, 1920.

On November 8, 1919, House Bill No. 10453 was introduced by Representative Esch, amended on November 17, 1919, and in this bill also the amendments *in re* divisions were substantially changed from those appearing in the bill of June 2, 1919, and are substantially those now found in the Transportation Act, 1920. In both of these bills a mandatory guide was placed before the Commission as to the factors which it must take into consideration in determining what are just and reasonable divisions. This guide consisted of the provisions proposed and urged by the Short Line Association representatives.

On December 19, 1919, Senator Gay, speaking before the Senate, made reference to the changes which had been made in the original drafts of the bill in order that weak railroads might be allowed to live, through the great power given to the Commission with respect to divisions. He said in part (Congressional Record, 66th Congress, Second Session, Vol. 59, p. 1028):

> "I think it of the highest importance, Mr. President, that the Commission be vested with complete and absolute authority over the divisions of all rates and fares of all common carriers subject to the act to regulate commerce.

> I cannot conceive of any opposition to this suggestion upon any reasonable or logical ground. It should be made possible for any railroad which considers its allowances or divisions of joint rates to be inadequate or unfair, to present the matter to the Interstate Commerce Commission for determination. I confidently believe that such a step would go a long way toward the solution of the problem presented by the so-called 'weak railroads.' "

There is no doubt whatever that both the Senate Committee and the House Committee fully appreciated the fact that special provision would have to be made in the pending bill for the protection of the weak railroads. In the report of the Senate Committee, Senator Cummins discusses at length the problem of enabling the weaker lines to live without granting exorbitant incomes to the strong roads. And Mr. Esch, Chairman of the House Committee, used the following language (House of Representatives, 66th Congress, First Session, Report No. 456, pp. 9 and 10):

> "While this guaranty plan is propounded with much confidence as the solution of the problem of the so-called 'weak sisters,' we believe that such elaborate machinery—so elaborate as to be unworkable in some of its parts and [sic] will result in disappointment. We believe that equally good, if not better, results can be obtained by the provisions of the pending bill. These provisions would authorize the Commission to permit the voluntary consolidation of the weaker with the stronger lines. By the application of minimum as well as maximum rates to permit a longer and weaker line to get a greater share of the business than

heretofore, and with the initiative in the Commission to establish joint rates and through routes, and the division of rates, would still further aid the short or weaker lines."

On page 16 the report comments on the power granted by the bill to the Commission to establish divisions of joint rates:

"The Commission, upon complaint or upon its own initiative, can compel a division of the rate. This is a matter in which the so-called short lines are vitally interested."

We call special attention to the fact that paragraph 6 of Section 15 of the new law is modelled after an amendment proposed by Mr. Cain on behalf of the American Short Line Railroad Association, which amendment reads as follows (Vol. 2, Printed Record, pp. 1904–5):

"And the Commission on complaint or upon its own initiative without a complaint, shall exercise the power and the authority to establish through routes, joint classification regulations and practices, and joint rates as the maximum or minimum, or maximum and minimum rates to be charged, also, the divisions of joint rates, fares, or charges whenever it may be considered necessary or desirable in the public interest.

The Commission shall inform itself and take into consideration the efficiency with which the carriers are operated, the financial condition and credit of the several carriers, the amount of revenue required to pay operating expenses, taxes and a fair return on the property used in the public service, and to establish and maintain a credit sufficient to attract the necessary

new capital, the importance of the carrier to the public as a transportation utility; also whether the participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion of the joint rate than another, and shall thereupon determine and prescribe what will be the just, fair, reasonable, and adequate division of the joint rate, fare, or charge as between the several carriers entitled to participate therein."

For convenient comparison we reproduce here paragraph 6 of Section 15 of the Transportation Act:

"Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reason-

able, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

APPENDIX B.

COMPARISON OF DIVISIONS WITH LOCAL RATES.

All New England Roads.

A tabulation of all the divisions (except those with Canada) shown in the exhibits introduced before the Interstate Commerce Commission by the intervening New England railroads, as compared with the authorized local rates for like distances east and west of the New England gateways, so as to indicate which group of carriers receives the larger proportion of its local rates by way of divisions, is appended hereto (Table I.). The results indicate that every one of the New England Roads receives a smaller percentage of its local rates in a majority of the cases shown. Weighting the percentages for the five roads by their relative amounts of interchanged tonnage as shown in Exhibit 12, it appears that the intervening New England Roads receive divisions equal to a smaller percentage of their authorized local rates than do their connections in 64.42% of the rates shown.

The C. F. A. Roads in their brief before the Commission complained that a comparison of divisions with local rates was unfair to the C. F. A. Roads because of the long haul west of the Hudson. They introduced several exhibits to present a fair picture. Among these were numbers 128 and 129 showing divisions between C. F. A. points and B. & M. points and New Haven points, respectively. In these exhibits they added certain short-haul points

to those shown in the New England Roads' exhibits in C. F. A. Territory and they dealt with the C. F. A. part of the rate rather than with the whole rate from the Hudson River gateways. It is significant that a comparison of divisions received by the New England carriers and those received by the C. F. A. carriers in relation to their local rates indicates in both of these exhibits that in 54% of the cases shown, the New England carriers get a smaller proportion of their local rates than do the C. F. A. carriers even when considered separately from the Trunk Lines, though in many cases (for example, New York Central, Pennsylvania, Erie, B. & O.) they are really the same roads. Exhibits 43 and 52 show, as appears from Table I., that the Trunk Line and C. F. A. carriers considered jointly get a larger percentage of their locals than do the Boston & Maine and the New Haven in 91% of the New England–C. F. A. rates set forth.

TABLE I.

	Total Rates (East- and Westbound).	N.E. gets Smaller Percentage of Local. No.	%	N.E. gets Larger Percentage of Local. No.	%
Exhibit 43—Boston & Maine.					
Trunk Line	824	450	54.6	374	45.4
C. F. A.	340	298	87.6	42	12.4
Total	1164	748	64.3	416	35.7
Exhibit 52—New Haven and Central New England.					
Trunk Line	520	216	41.5	304	58.5
C. F. A.	220	211	95.9	9	4.1
Southern	70	68	97.1	2	2.9
Transcontinental	60	60	100	0	.0
Total	870	555	63.8	315	36.2
Exhibit 45—Maine Central. *					
Trunk Line	12	4	33.3	8	66.7
C. F. A.	26	22	84.6	4	15.4
Southern	4	4	100	0	0
Transcontinental	4	4	100	0	0
Total	46	34	73.9	12	26.1

* Figures from Exh. 45 are for Maine Central alone, not for the whole N. E. haul.

	Total Rates (East- and Westbound).	N. E. gets Smaller Percentage of Local. No.	%	N. E. gets Larger Percentage of Local. No.	%
Exhibits 46–51—Central Vermont.					
Trunk Line	300	98	33	202	67
C. F. A.	240	146	61	94	39
Southern	90	82	91	8	9
Transcontinental	50	25	50	25	50
Total	680	351	51.6	329	48.4
Exhibit 64—Rutland.					
Trunk Line	240	172	72	68	28
C. F. A.	40	27	67.5	13	32.5
Total	280	199	71	81	29
Grand Total	3040	1887	62.1	1153	37.9

Per cent. of cases where N. E. Roads get smaller proportion of local (individual roads' per cents. weighted by amounts of interchange tonnage from Exh. 12), 64.42.

APPENDIX C.

COMPARISON OF DIVISIONS WITH LOCAL RATES.

Boston & Maine.

Exhibit 43 shows divisions of joint rates between representative points on the Boston & Maine and in Trunk Line Territory, east- and westbound, and between representative points on the Boston & Maine and in C. F. A. Territory, westbound. We give below (Table II) the percentages of the authorized local rates east and west of the Hudson River which are received as divisions by the New England carriers and the other participating carriers, as groups, respectively, on traffic between Boston, Springfield, Fitchburg, Concord, N.H., and Portland, Me., and eleven Trunk Line points and five C. F. A. points. Boston is the most important tonnage point on the Boston & Maine in both received and forwarded tonnage; Springfield is sixth in received and ninth in forwarded; Fitchburg is twelfth in both received and forwarded; Portland is eleventh in received and twenty-second in forwarded; and Concord is twenty-fourth in received and eleventh in forwarded. The other points shown in Exhibit 43 are not tabulated here because they are of less tonnage importance (Exh. 86; Rec. p. 576).

Tables III and IV summarize and analyze the figures given in Table II to show the spread of the percentages for each group of carriers (Table III), and the proportion of instances in which each group receives a smaller or larger percentage of its author-

ized local rate by way of division of the joint rate (Table IV). We call particular attention to the final figures in Table IV which indicate that the New England carriers receive a smaller percentage of their local rates than do their connections in 66.2% of the rates tabulated. This indicates that the B. & M. figure of 64.3% shown in Appendix B, Table I, is more conservative than would be the case if the rates tabulated were weighted by reference to the amounts of traffic moving on them.

(The names of the junction points between the New England and connecting carriers are abbreviated as follows: T, Troy; J, Jersey City; M, Mechanicville; R, Rotterdam Junction; N, Newport; S, St. Johns.)

Table II.

Boston and Trunk Line Points.

Outside Point.	Junction.	N. E. Per Cent. of Anderson Scale (Item L). 1st.	N. E. Per Cent. of Anderson Scale (Item L). 6th.	Trunk & C. F. A. Lines Per Cent. of Local (Item O). 1st.	Trunk & C. F. A. Lines Per Cent. of Local (Item O). 6th.	Pages of Exhibit.
New York	T	49.20	55.20	60.20	60.50	1
Newark	J	57.00	87.50	62.30	73.60	3 & 19
Newark	M	31.40	47.90	65.00	73.20	3 & 19
Philadelphia	J	57.00	87.40	47.40	44.10	3 & 19
Philadelphia	M	30.50	46.50	65.90	28.10	3 & 19
Baltimore	J	53.00	75.70	54.80	60.80	3 & 23
Baltimore	M	30.80	43.50	83.90	87.50	3 & 23
Washington	J	49.80	76.50	63.70	80.40	3 & 23
Washington	M	31.10	49.60	75.70	82.70	3 & 23
Pittsburg	J	42.60	52.10	66.10	67.30	3 & 25
Pittsburg	M	32.00	39.10	88.90	91.10	3,11 & 25
Pittsburg	R	33.80	41.30	76.60	78.10	11 & 25
Scranton	J	51.00	70.60	45.60	52.00	7 & 22
Scranton	M	47.70	66.10	55.50	56.40	7 & 22
Altoona	J	50.70	61.90	50.70	61.90	7 & 24
Altoona	M	40.60	49.60	80.90	82.50	7 & 24
Harrisburg	J	50.80	70.60	48.30	52.00	7 & 24
Harrisburg	M	32.20	44.30	72.80	74.30	7 & 24
Rochester	R	47.70	66.30	60.60	74.30	11 & 20
Rochester	M	39.30	53.90	73.60	86.50	11 & 20
Rochester	J	31.60	43.10	69.70	70.70	20
Buffalo	R	46.90	57.90	73.20	74.20	11 & 22
Buffalo	M	42.10	51.30	81.00	82.10	11 & 22
Buffalo	J	38.06	46.12	66.98	68.46	22

Boston to C. F. A. Points.

Outside Point.	Junction.	N. E. Per Cent. of Anderson Scale (Item L). 1st.	N. E. Per Cent. of Anderson Scale (Item L). 6th.	Trunk & C. F. A. Lines Per Cent. of Local (Item O). 1st.	Trunk & C. F. A. Lines Per Cent. of Local (Item O). 6th.	Pages of Exhibit.
Chicago	N	33.30	44.10	80.00	77.60	15 & 27
Chicago	R	37.70	45.00	99.30	99.30	16 & 27
Chicago	S	41.70	54.10	65.10	64.50	18 & 27
Chicago	J	44.80	53.50	73.50	73.50	27
St. Louis	N	32.50	43.00	83.40	81.50	15 & 28
St. Louis	R	36.90	43.30	99.90	100.20	16 & 28
St. Louis	S	37.70	48.60	72.10	71.90	18 & 28
St. Louis	J	44.80	53.50	77.30	77.40	28
Indianapolis	N	27.40	37.40	82.50	79.80	15 & 27
Indianapolis	R	37.80	45.40	99.10	99.00	16 & 27
Indianapolis	S	33.50	44.10	63.70	63.40	18 & 27
Indianapolis	J	44.80	53.50	71.50	71.60	27
Grand Rapids	N	30.70	41.10	80.00	77.40	15 & 26
Grand Rapids	R	37.80	45.40	93.00	98.90	16 & 26
Grand Rapids	S	38.50	50.00	64.70	64.70	18 & 26
Grand Rapids	J	44.80	53.50	71.20	71.30	26
Cincinnati	N	26.90	36.70	81.50	78.60	15 & 26
Cincinnati	R	36.70	43.80	98.50	100.00	16 & 26
Cincinnati	S	33.80	44.10	57.80	57.10	18 & 26
Cincinnati	J	44.80	53.50	69.50	69.50	26

Springfield to C. F. A. Points.

Outside Point.	Junction.	N. E. Per Cent. of Anderson Scale (Item L). 1st.	6th.	Trunk & C. F. A. Lines Per Cent. of Local (Item O). 1st.	6th.	Pages of Exhibit.
Chicago	N	36.40	47.80	78.00	75.70	15
Chicago	S	41.90	53.80	65.10	64.70	18
St. Louis	N	36.20	47.00	81.40	79.70	15
St. Louis	S	49.20	50.70	71.20	71.00	18
Indianapolis	N	31.00	41.50	80.00	77.50	15
Indianapolis	S	35.70	47.60	62.40	62.20	18
Grand Rapids	N	33.60	44.40	77.90	75.50	15
Grand Rapids	S	39.90	51.70	63.20	63.70	18
Cincinnati	N	30.60	40.70	78.80	76.10	15
Cincinnati	S	35.80	47.60	56.60	55.90	18

(Springfield and Trunk Line Points not shown in Exhibit.)

Fitchburg and Trunk Line Points.

Outside Point.	Junction.	N. E. Per Cent. of Anderson Scale (Item L). 1st.	N. E. Per Cent. of Anderson Scale (Item L). 6th.	Trunk & C. F. A. Lines Per Cent. of Local (Item O). 1st.	Trunk & C. F. A. Lines Per Cent. of Local (Item O). 6th.	Pages of Exhibit.
New York	T	55.60	60.50	60.20	59.50	1
Newark	J	67.40	104.50	42.00	47.20	3 & 19
Newark	M	35.60	53.70	65.00	73.20	3 & 19
Philadelphia	J	67.40	104.50	32.00	28.80	3 & 19
Philadelphia	M	34.50	52.20	65.90	74.30	3 & 19
Baltimore	J	66.60	97.10	40.10	42.80	3 & 23
Baltimore	M	34.80	48.80	83.90	87.50	3 & 23
Washington	J	64.80	101.20	49.00	61.50	3 & 23
Washington	M	35.20	55.60	75.70	82.70	3 & 23
Pittsburg	J	44.30	54.30	66.10	67.30	3 & 25
Pittsburg	M	36.20	43.90	88.90	91.10	3,11 & 25
Pittsburg	R	38.00	46.00	84.20	86.30	11 & 25
Scranton	J	53.10	73.40	45.70	52.00	7 & 22
Scranton	M	45.60	62.40	63.80	65.00	7 & 22
Altoona	J	52.80	64.50	59.20	62.30	7 & 24
Altoona	M	45.90	55.60	81.00	82.50	7 & 24
Harrisburg	J	53.10	73.50	48.30	52.00	7 & 24
Harrisburg	M	36.40	49.80	72.90	74.30	7 & 24
Rochester	R	53.60	74.00	60.60	74.30	11 & 20
Rochester	M	44.40	60.50	73.60	86.50	11 & 20
Rochester	J	41.90	60.40	59.60	57.90	20
Buffalo	R	52.70	63.70	73.20	74.20	11 & 22
Buffalo	M	47.50	57.60	80.90	82.10	11 & 22
Buffalo	J	50.00	63.71	56.97	55.75	22

(Fitchburg to C. F. A. Points not shown.)

Concord and Trunk Line Points.

Outside Point.	Junction.	N. E. Per Cent. of Anderson Scale (Item L). 1st.	N. E. Per Cent. of Anderson Scale (Item L). 6th.	Trunk & C. F. A. Lines Per Cent. of Local (Item O). 1st.	Trunk & C. F. A. Lines Per Cent. of Local (Item O). 6th.	Pages of Exhibit.
New York	T	69.80	72.10	47.60	43.10	1
Newark	J	72.00	98.50	48.60	47.20	2 & 19
Newark	M	50.20	70.40	57.60	54.60	2 & 19
Philadelphia	J	72.00	98.50	37.00	28.80	2 & 19
Philadelphia	M	44.10	62.60	64.30	61.10	2 & 19
Baltimore	J	63.00	91.50	40.10	42.80	2 & 23
Baltimore	M	40.20	60.40	73.40	73.60	2 & 23
Washington	J	61.30	95.40	49.00	61.40	2 & 23
Washington	M	41.10	68.20	66.80	71.10	2 & 23
Pittsburg	J	51.90	65.80	56.30	55.20	2 & 25
Pittsburg	M	44.60	58.20	76.60	75.30	2, 10 & 25
Pittsburg	R	51.40	66.10	62.50	61.20	10 & 25
Scranton	J	61.80	81.10	38.60	39.60	6 & 22
Scranton	M	64.70	86.50	45.00	39.60	6 & 22
Altoona	J	59.80	75.00	49.30	50.00	6 & 24
Altoona	M	44.60	58.20	77.10	75.40	6 & 24
Harrisburg	J	61.30	80.80	40.70	40.00	6 & 24
Harrisburg	M	50.10	67.80	59.70	55.00	6 & 24
Rochester	R	64.10	86.20	46.10	51.40	10 & 20
Rochester	M	56.10	76.50	59.40	64.70	10 & 20
Rochester	J	26.21	56.75	80.90	58.70	20
Buffalo	R	62.10	77.50	55.00	53.70	10 & 22
Buffalo	M	57.80	73.00	62.90	61.20	10 & 22
Buffalo	J	46.79	58.91	57.00	55.75	22

Concord to C. F. A. Points.

Outside Point.	Junction.	N. E. Per Cent. of Anderson Scale (Item L). 1st.	6th.	Trunk & C. F. A. Lines Per Cent. of Local (Item O). 1st.	6th.	Pages of Exhibit.
Chicago	N	40.00	52.80	79.00	76.70	15 & 27
Chicago	R	57.70	72.90	85.60	83.30	16 & 27
Chicago	S	45.20	57.80	65.10	64.70	18 & 27
Chicago	J	61.10	75.50	63.60	61.90	14 & 27
St. Louis	N	38.20	50.60	83.00	81.00	15 & 28
St. Louis	R	56.70	71.20	88.70	87.10	16 & 28
St. Louis	S	40.60	52.20	72.10	71.90	18 & 28
St. Louis	J	61.10	75.50	68.80	67.50	14 & 28
Indianapolis	N	32.10	42.50	82.10	80.00	15 & 27
Indianapolis	R	57.10	72.10	84.70	82.30	16 & 27
Indianapolis	S	36.10	47.40	63.70	63.40	18 & 27
Indianapolis	J	61.10	75.50	60.80	59.20	14 & 27
Grand Rapids	N	36.90	49.40	79.00	76.30	15 & 26
Grand Rapids	R	56.90	72.10	79.40	82.10	16 & 26
Grand Rapids	S	41.40	53.70	64.70	64.70	18 & 26
Grand Rapids	J	61.10	75.50	60.40	59.20	14 & 26
Cincinnati	N	32.50	43.80	80.30	77.90	15 & 26
Cincinnati	R	55.20	69.50	83.60	82.30	16 & 26
Cincinnati	S	36.50	47.40	57.80	57.10	18 & 26
Cincinnati	J	61.10	75.50	58.10	56.00	14 & 26

Portland and Trunk Line Points.

Outside Point.	Junction.	N. E. Per Cent. of Anderson Scale (Item L). 1st.	N. E. Per Cent. of Anderson Scale (Item L). 6th.	Trunk & C. F. A. Lines Per Cent. of Local (Item O). 1st.	Trunk & C. F. A. Lines Per Cent. of Local (Item O). 6th.	Pages of Exhibit.
New York	T	65.80	69.40	55.50	50.20	1
Newark	J	71.70	89.90	53.10	47.20	2 & 19
Newark	M	46.20	60.00	66.20	57.80	2 & 19
Philadelphia	J	71.70	89.80	40.40	28.80	2 & 19
Baltimore	J	63.30	83.50	44.60	42.80	2 & 23
Washington	J	58.10	87.00	50.70	61.40	2 & 23
Pittsburg	J	47.80	60.00	56.30	55.20	2 & 25
Pittsburg	M	40.40	52.50	76.60	75.10	2, 10 & 25
Pittsburg	R	42.80	54.70	71.30	70.10	10 & 25
Scranton	J	60.90	74.00	41.90	39.60	6 & 22
Scranton	M	60.50	74.50	50.50	42.90	6 & 22
Altoona	J	55.10	68.40	49.20	50.00	6 & 24
Altoona	M	40.40	52.50	77.00	75.40	6 & 24
Harrisburg	J	61.00	74.00	44.10	39.60	6 & 24
Harrisburg	M	47.90	60.00	66.10	56.10	6 & 24
Rochester	R	60.60	75.10	53.80	55.20	10 & 20
Rochester	M	52.10	65.90	68.30	68.40	10 & 20
Rochester	J	41.60	52.60	68.20	58.90	20
Buffalo	R	54.00	67.20	58.60	57.10	10 & 22
Buffalo	M	50.50	62.70	68.10	64.60	10 & 22
Buffalo	J	44.50	54.70	58.30	55.80	22

Portland to C. F. A Points.

Outside Point.	Junction.	N. E. Per Cent. of Anderson Scale (Item L). 1st.	N. E. Per Cent. of Anderson Scale (Item L). 6th.	Trunk & C. F. A. Lines Per Cent. of Local (Item O). 1st.	Trunk & C. F. A. Lines Per Cent. of Local (Item O). 6th.	Pages of Exhibit.
Chicago	J	54.10	67.00	65.30	63.60	14 & 27
Chicago	N	38.30	50.60	70.40	74.70	27
Chicago	R	48.80	61.10	88.60	86.40	16 & 27
Chicago	S	47.50	61.40	61.10	60.70	27
St. Louis	J	54.10	67.00	70.30	68.90	14 & 28
St. Louis	N	36.50	47.90	81.40	79.70	28
St. Louis	R	48.90	61.90	90.50	88.40	16 & 28
St. Louis	S	44.50	56.60	68.50	68.30	28
Indianapolis	J	54.10	67.00	62.70	61.00	14 & 27
Indianapolis	N	31.90	41.50	79.60	77.90	27
Indianapolis	R	48.40	60.40	87.80	85.70	16 & 27
Indianapolis	S	39.70	51.40	60.00	59.40	27
Grand Rapids	J	54.10	67.00	62.30	60.60	14 & 26
Grand Rapids	N	35.30	47.20	77.00	74.70	26
Grand Rapids	R	47.90	60.80	82.60	85.30	16 & 26
Grand Rapids	S	44.40	57.20	60.80	60.60	26
Cincinnati	J	54.10	67.00	60.20	58.00	14 & 26
Cincinnati	N	30.20	43.00	79.40	75.20	26
Cincinnati	R	46.90	58.90	86.80	85.40	16 & 26
Cincinnati	S	40.30	51.70	53.90	53.20	26

TABLE III.

Analysis of these tabulations with reference to spread of percentages shows:

	1st Class.				*6th Class.*			
	N.E.		Outside N.E.		N.E.		Outside N.E.	
	Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.
Boston & T. L.	30.50	57.00	45.60	88.90	39.10	87.50	28.10	91.10
Fitchburg & T. L.	34.50	67.40	32.00	88.90	43.90	104.50	28.80	91.10
Concord & T. L.	26.61	72.00	37.00	80.90	56.75	98.50	28.80	75.40
Portland & T. L.	40.40	71.70	40.40	77.00	52.50	89.80	28.80	75.40
Total T. L.	26.61	72.00	32.00	88.90	39.10	104.50	28.10	91.10
Boston to C. F. A.	26.90	44.80	57.80	99.90	36.70	53.50	57.10	100.20
Springfield to C. F. A.	30.60	49.20	56.60	81.40	40.70	53.80	55.90	79.70
Concord to C. F. A.	32.10	61.10	57.80	88.70	42.50	75.50	56.00	87.10
Portland to C. F. A.	30.20	54.10	53.90	90.50	41.50	67.00	53.20	88.40
Total C. F. A.	26.90	61.10	53.90	99.90	36.70	75.50	53.20	100.20

TABLE IV.

Analysis with reference to which group receives the larger percentage of its local rates shows:

	Total No. Rates Tabulated (East- and Westbound).	N.E. gets Smaller Percentage of Local. No.	%	N.E. gets Larger Percentage of Local. No.	%
Boston & T. L.	96	76*	79	20	21
Fitchburg & T. L.	96	64	67	32	33
Concord & T. L.	96	36	37.5	60	62.5
Portland & T. L.	84	36	43	48	57
Total T. L.	372	212	57	160	43
Boston to C. F. A.	40	40	100	—	—
Springfield to C. F. A.	20	20	100	—	—
Concord to C. F. A.	40	32	80	8†	20
Portland to C. F. A.	40	35	87.5	5†	12.5
Total C. F. A.	140	127	91	13	9
Grand Total	512	339	66.2	173	33.8

*In 4 of these 76 rates the percentage of local rate received by both groups of roads is the same.
†12 of these 13 rates are *via* B. & M., N. Y. & N. H. & H., & P. R.R. (Jersey City).

APPENDIX D.

SUFFICIENCY OF EVIDENCE CONCERNING DIVISIONS.

Destinations, Junctions, Routes and Groups.

The intervening New England Roads introduced exhibits showing joint rates between themselves and various of the Trunk Lines, C. F. A. and other carriers. These exhibits all show first- and sixth-class* rates. They tabulate the through rate, the divisions thereof east and west of the New England gateways, the authorized local rates for corresponding distances east and west, the percentages which the divisions bear to the authorized locals, the amounts and percentages of the divisions east and west in excess of or less than the mileage prorates, the ton mile earnings east and west, and the basis for the divisions, together with arbitraries, etc., if any. They also show the routes, junctions, participating carriers, and percentage or prorating blocks or groups for traffic to various regions.

Exhibits 43 and 44 show Boston & Maine divisions; Exhibit 45 shows Maine Central; Exhibits 46 to 51 show Central Vermont; Exhibit 52 shows New Haven and Central New England; Exhibit 64 shows Rutland.

The prorating or percentage groups on joint traffic between New England and outside points are shown graphically in many exhibits introduced by both complainants and defendants. For example, Exhibit 42 shows B. & M., 53 to 60 show New Haven and C. N. E., 64 Rutland, 74 Erie, 87 Maine Central, 90 C. N. J. and New Haven, 91 C. N. J. and B. & M., 152 C. F. A. and New Haven, 153 C. F. A. and B. & M., 154 C. F. A. and Maine Central, 155 C. F. A. *via* Harlem River, Rotterdam Jct., Maybrook, and B. & A. junctions.

* Exhibit 44, Boston & Maine-Transcontinental, shows rates on certain named commodities, not class rates.

The defendants before the Interstate Commerce Commission alleged that the complainants did not furnish any evidence to show the amounts of tonnage moving over the various through routes portrayed in their exhibits. As the Commission stated in its first opinion (Rec. p. 83), however, the complainants furnished to the defendants lists of their most important tonnage points. On the basis of these lists the defendants made up many exhibits showing joint rates and divisions or mileages and percentages upon which divisions were based. The defendants introduced similar evidence for their own roads in so far as they desired to do so.

The defendants introduced about a score of exhibits and a great deal of testimony showing through routes, joint rates and divisions between themselves and all of the intervening New England Roads. These exhibits and this testimony cover many of the same routes and rates as those introduced by the New England Roads. They also supplement the latter in those cases in which the Trunk Line and C. F. A. Roads considered it necessary to add to the divisions already in the record.

The defendants were requested, both orally and in writing, to furnish to the complainants instances of divisions which they claimed to be typical of divisions with the New England Roads. On January 6, 1921, the chief counsel for the New England Roads wrote to Henry W. Biklé, Esq., Assistant General Counsel of the Pennsylvania System, asking for information of various sorts to be used by the New England Roads in the presentation of their case. Among other requests were the following:

> "Such instances of divisions as are claimed by the Trunk Lines and C. F. A. lines to be typical of divisions with the New England lines. . . .
>
> Description or maps showing blocking of

Trunk Line and C. F. A. roads for divisions with New England roads. . . .

Terminal deductions or arbitraries on Trunk Lines or C. F. A. lines on any business interchanged with New England."

The hearings before the Interstate Commerce Commission continued for more than a month after the date of this letter. The first argument was three months later and the reargument nearly a year later.

That the divisions introduced in evidence by the complainants were fair and illustrative was admitted by the two chief traffic experts who testified for the defendants (*supra*, p. 107).

As illustrations of the completeness with which the exhibits of the New England Roads covered the field, we append Tables V. to VIII.

Table V. shows the points between which joint rates were set forth in the Boston & Maine exhibits, giving the points of destination on the Boston & Maine, the junction at which the traffic passes from the rails of the New England carrier to those of the Trunk Line connection, and the points of destination outside of New England.

Table VI. shows similar information for the New Haven and Central New England railroads.

Table VII. shows the through routes to and from Boston *via* the Boston & Maine which appear in the Boston & Maine exhibits, giving the point of origin or destination outside of New England, the New England gateway and the carriers other than the Boston & Maine which participate in the haul.

Table VIII. shows similar information for Boston *via* the New Haven Railroad or the New Haven and Central New England Railroads.

For the sake of brevity, we do not tabulate the

destinations, junctions and routes of divisions shown by the Maine Central, Central Vermont and Rutland Railroads. The Maine Central in Exhibit 45 shows joint rates between Bangor, Rockland, Lewiston, Rumford and Machias, Me., and various points in Trunk Line, C. F. A., Southern and Transcontinental Territory. The routes shown are *via* Mechanicville, Jersey City, Newport, Maybrook, Rotterdam Junction, Mechanic Falls, Me., and several other New England gateways.

The Central Vermont exhibits show rates between St. Albans, Montpelier, Sharon, Palmer and Willimantic and points in outside territory which are in general the same as the points shown by the New Haven exhibit. The junctions are Harlem River, Maybrook, Mechanicville, Norwood, N.Y., Rouses Point, N.Y., St. John's, P.Q., and Swanton, Vt. Rates and divisions are shown from the five Vermont Central points to fifteen Trunk Line points, 12 C. F. A. points, 7 Southern points, 6 Transcontinental points, and 7 Canadian points.

The Rutland exhibits show divisions between Burlington and Rutland, Vt., and 4 Trunk Line points and 5 C. F. A. points. The junctions shown include Chatham, N.Y., Troy, Rotterdam Junction, Rutland, Jersey City and Norwood.

TABLE V.

Exhibits 43 and 44—B. & M.

N. E. Point.	N. E. Junction.	Outside Point.
TRUNK LINE:		
Boston	Troy	New York City
Portland, Me.		
Fitchburg		
Concord, N.H.		
St. Johnsbury, Vt.		
Keene, N.H.		
Johnsonville		

N. E. Point.	N. E. Junction.	Outside Point.
Boston Portland Fitchburg Concord St. Johnsbury Keene	Jersey City	Newark Philadelphia Baltimore Washington Pittsburg Harrisburg Altoona Sayre Allentown Scranton Rochester Buffalo
Boston Portland Fitchburg Concord St. Johnsbury Keene Johnsonville	Mechanicville	Syracuse Rochester Buffalo Pittsburg Newark Philadelphia Allentown Sayre Scranton Baltimore Washington Harrisburg Altoona
Boston Portland Fitchburg Concord St. Johnsbury Keene Johnsonville	Rotterdam	Syracuse Rochester Buffalo Pittsburg
C. F. A.:		
Boston Springfield* Portland Haverhill Dover* Bellows Falls† Concord St. Johnsbury Greenfield No. Conway‡ Sherbrooke‡	Jersey City Rotterdam Newport St. John's	Cincinnati Grand Rapids Indianapolis Chicago St. Louis

* *Via* Newport and St. John's only.
† *Via* Jersey City only.
‡ *Via* Rotterdam Junction only.

N. E. Point.	N. E. Junction.	Outside Point.
TRANSCONTINENTAL:		
Boston Manchester, N.H.	Rotterdam	Seattle Spokane San Francisco Los Angeles
Lowell	Rotterdam	Los Angeles
Gardner, Mass. Orange, Mass. Union Market, Mass.	Rotterdam	Los Angeles Seattle

TABLE VI.

Exhibit 52—New Haven

TRUNK LINE:		
Boston Fall River Hartford	Jersey City	Newark Allentown* Philadelphia Washington Baltimore Richmond Rochester Harrisburg Sayre
Boston Fall River Hartford Winsted Poughkeepsie	Jersey City	Philadelphia Washington Baltimore Richmond Altoona Harrisburg Pittsburg
Boston Fall River Hartford Winsted Poughkeepsie	Campbell Hall	Newark Binghamton Buffalo
Winsted Poughkeepsie	Maybrook	Newark Allentown* Philadelphia Washington Baltimore Harrisburg Sayre Rochester

*2 routes.

N. E. Point.	N. E. Junction.	Outside Point.
Boston Fall River Hartford Winsted Poughkeepsie	Maybrook	Scranton* Binghamton Syracuse
Westerly	Worcester	Rochester Syracuse Buffalo
New Bedford	Framingham	Rochester Syracuse Buffalo
Stamford	State Line	Rochester Syracuse Buffalo
Winsted	Beacon	Rochester Syracuse Buffalo
C. F. A.:		
Boston Fall River Hartford Winsted Poughkeepsie	Campbell Hall	Youngstown Cleveland Detroit Cincinnati Indianapolis Chicago Louisville St. Louis Cairo St. Paul Duluth
Westerly	Worcester	Grand Rapids
New Bedford	Framingham	Grand Rapids
Stamford	State Line	Grand Rapids
Winsted Poughkeepsie	Beacon	Grand Rapids
SOUTH:		
Boston Fall River Hartford Winsted Poughkeepsie	Jersey City	Atlanta Savannah Jacksonville Nashville

*2 routes.

N. E. Point.	N. E. Junction.	Outside Point.
Boston	Maybrook	Birmingham
Fall River		Memphis
Hartford		New Orleans
Winsted		
Poughkeepsie		
CANADA:		
Boston	Newport	Montreal
Fall River		Ottawa
Hartford		Hamilton
Winsted		Toronto
Poughkeepsie		London
		Sault Ste. Marie
		Port Arthur
		Fort William
TRANSCONTINENTAL:		
Boston	Maybrook	Vancouver
Fall River		Spokane
Hartford		Seattle
Winsted		
Poughkeepsie		
Boston	Campbell Hall	Portland, Ore.
Fall River		San Francisco
Hartford		Los Angeles
Winsted		
Poughkeepsie		

TABLE VII.

Exhibits 43 and 44—B. & M.

BOSTON (Trunk Line):		
New York City	Troy	NYC
Newark	Jersey City	NH—PRR
Newark	Mechanicville	D&H—CNJ
Philadelphia	Jersey City	NH—PRR
Philadelphia	Mechanicville	D&H—CNJ—P&R
Baltimore	Jersey City	NH—PRR
Baltimore	Mechanicville	D&H—CNJ—P&R—B&O
Washington	Jersey City	NH—PRR
Washington	Mechanicville	D&H—CNJ—P&R—B&O
Pittsburg	Jersey City	NH—PRR
Pittsburg	Mechanicville	D&H—PRR

Pittsburg	Rotterdam Jct.	WS—BR&P
Scranton	Jersey City	NH—CNJ
Scranton	Mechanicville	D&H
Altoona	Jersey City	NH—PRR
Altoona	Mechanicville	D&H—PRR
Harrisburg	Jersey City	NH—PRR
Harrisburg	Mechanicville	D&H—PRR
Rochester	Jersey City	NH—PRR
Rochester	Rotterdam Jct.	NYC
Rochester	Mechanicville	D&H—Erie
Buffalo	Jersey City	NH—PRR
Buffalo	Rotterdam Jct.	NYC
Buffalo	Mechanicville	D&H—Erie
Syracuse	Rotterdam Jct.	NYC
Syracuse	Mechanicville	D&H—DL&W
Allentown	Jersey City	NH—CNJ
Allentown	Mechanicville	D&H—CNJ
Sayre	Jersey City	NH—LV
Sayre	Mechanicville	D&H—LV

BOSTON (C. F. A.):

Chicago	Newport	CP—WAB
Chicago	Rotterdam Jct.	NYC
Chicago	St. John's	CV—GT
Chicago	Jersey City	NH—PRR
St. Louis	Newport	CP—WAB
St. Louis	Rotterdam Jct.	NYC—CCC&StL
St. Louis	St. John's	CV—GT—D&TS—CCC&StL
St. Louis	Jersey City	NH—PRR
Indianapolis	Newport	CP—DT&I—LE&W
Indianapolis	Rotterdam Jct.	NYC—CCC&StL
Indianapolis	St. John's	CV—GT—CCC&StL
Indianapolis	Jersey City	NH—PRR
Grand Rapids	Newport	CP—PM
Grand Rapids	Rotterdam Jct.	NYC—MC
Grand Rapids	St. John's	CV-GT
Grand Rapids	Jersey City	NH—PRR
Cincinnati	Newport	CP—D&TS—B&O
Cincinnati	Rotterdam Jct.	NYC—CCC&StL
Cincinnati	St. John's	CV—GT—D&TS—CCC&StL
Cincinnati	Jersey City	NH—PRR

BOSTON (Transcontinental):

Seattle (6 Commodity Rates)	Rotterdam	NYC—CB&Q—GtN
Spokane (2 Commodity Rates)	Rotterdam	NYC—CM&StP

San Francisco (2 Commodity Rates)	Rotterdam	NYC—C&NW—UP—SP
Los Angeles (12 Commodity Rates)	Rotterdam	NYC—AT&SF

TABLE VIII.

Exhibit 52—New Haven.

BOSTON (Trunk Line):

Newark	Campbell Hall	Erie
Newark	Jersey City	LV
Allentown	Jersey City	CNJ
Allentown	Jersey City	LV
Scranton	Maybrook	L&HR—CNJ
Scranton	Maybrook	L&HR—DL&W
Philadelphia	Jersey City	PRR
Philadelphia	Jersey City	CNJ—P&R
Washington	Jersey City	PRR
Washington	Jersey City	CNJ—P&R—B&O
Baltimore	Jersey City	PRR
Baltimore	Jersey City	CNJ—P&R—B&O
Richmond	Jersey City	PRR—RF&P
Richmond	Jersey City	CNJ—B&O—P&R—RF&P
Rochester	Jersey City	LV
Syracuse	Maybrook	L&HR—DL&W
Buffalo	Campbell Hall	Erie
Binghamton	Campbell Hall	Erie
Binghamton	Maybrook	L&HR—DL&W
Altoona	Jersey City	PRR
Harrisburg	Jersey City	PRR
Harrisburg	Jersey City	CNJ—P&R
Pittsburg	Jersey City	PRR
Sayre	Jersey City	LV

BOSTON (C. F. A.):

Youngstown	Campbell Hall	Erie
Cleveland	Campbell Hall	Erie
Detroit	Campbell Hall	Erie—MC
Cincinnati	Campbell Hall	Erie
Indianapolis	Campbell Hall	Erie
Chicago	Campbell Hall	Erie
Louisville	Campbell Hall	Erie—L&N
St. Louis	Campbell Hall	Erie—CCC&StL
Cairo	Campbell Hall	Erie—CCC&StL

St. Paul	Campbell Hall	Erie—CM&StP
Duluth	Campbell Hall	Erie—CM&StP
Boston (South):		
Atlanta	Jersey City	PRR—CV—L&W—WSSB—SAL
Savannah	Jersey City	PRR—SoRy
Jacksonville	Jersey City	PRR—NYP&N—ACL
Birmingham	Maybrook	L&HR—CNJ—P&R—WM—N&W—SoRy—AGS
Nashville	Jersey City	LV—MC—CCC&StL—L&N
Memphis	Maybrook	L&HR—DL&W—MC—CCC&StL—L&N
New Orleans	Maybrook	L&HR—CNJ—P&R—WM—N&W—C&O—L&N
Boston (Canada):		
Montreal	Newport	CP
Ottawa	Newport	CP
Hamilton	Newport	CP
Toronto	Newport	CP
London	Newport	CP
S. S. Marie	Newport	CP
Port Arthur	Newport	CP
Fort William	Newport	CP
Boston (Transcontinental):		
Vancouver	Maybrook	L&HR—DL&W—MC—CB&Q—NP
Spokane	Maybrook	L&HR—DL&W—MC—CM&StP
Seattle	Maybrook	L&HR—DL&W—MC—CM&StP
Portland	Campbell Hall	Erie—CM&StP
San Francisco	Campbell Hall	Erie—CGW—UP—SP
Los Angeles	Campbell Hall	Erie—CGW—UP—SP

In order to keep this appendix within reasonable limits, we do not tabulate rates for other points than Boston *via* the Boston & Maine or the New Haven Railroads. Tables for many other New England cities would show about as many routes and

destinations as Boston. In the case of lines of traffic in which Boston does not participate, divisions to several New England cities appear in the exhibits. For example, on traffic moving to New Haven Territory, *via* the Boston & Albany junctions, Exhibits 52 and 157 show rates to and from Westerly, New Bedford, Stamford, Winsted, Poughkeepsie, Van Deusenville, Bridgeport, New Lenox, Housatonic, Holyoke, Mt. Carmel, Melrose, New London, Auburn, Stonington, Marlboro and Provincetown *via* one or more of the following B. & A. junctions: State Line, Pittsfield, Westfield, Springfield, Worcester and South Framington, or *via* the New York Central at Beacon.

If there was any lack of completeness in the exhibits introduced by the complainants, the defendants' exhibits made up for it. For example, in Exhibit 73 the Erie Railroad introduced rates and divisions between points in each one of the five Erie division groups, and each one of the three New Haven division groups. In Exhibit 81 the Baltimore & Ohio Railroad introduced rates and divisions between 11 Trunk Line points and 9 New England points for the purpose of illustrating divisions between long-haul and short-haul destinations. In Exhibit 82 the Delaware & Hudson road introduced divisions between 10 of its points and 29 of the 30 chief tonnage points of the Boston & Maine; also divisions between 3 Erie points and 4 Pennsylvania Railroad points and the 29 Boston & Maine points, *via* the D. & H. In Exhibit 85 the New York Central introduced a statement of mileages and percentages between Utica, Syracuse, Rochester and Buffalo, N.Y., and all of the chief tonnage points on

the New Haven and Central New England Railroads *via* Boston & Albany junctions. In Exhibits 128 and 129 and 156 to 163 the C. F. A. Lines introduced rates, divisions and percentages between C. F. A. points and New England. Exhibit 128 adds the following destinations to those shown in Boston & Maine Exhibit 43: Cleveland and Youngstown, Ohio; Keene, N.H.; North Adams and Worcester, Mass. Exhibit 129 adds two routes to those shown in the New Haven exhibit on traffic between New Haven and C. F. A. points. These routes are *via* Maybrook and Jersey City. Exhibits 156–163 show percentages between St. Louis, Cincinnati, Detroit, Grand Rapids, Cleveland, Chicago, Indianapolis and Youngstown and the following New England territory *via* the routes indicated:

To all percentage groups on the N. Y., N. H. & H. R.R. *via*

(*a*) Harlem River (Jersey City)
(*b*) Campbell Hall or Maybrook
(*c*) Boston & Albany Junctions

To all percentage groups on the Boston & Maine R.R. *via*

(*a*) Rotterdam Junction
(*b*) Mechanicville
(*c*) Harlem River

To all percentage groups on Maine Central R.R. *via*

(*a*) Harlem River
(*b*) Rotterdam Junction
(*c*) Mechanicville

To Central New England Railway *via*

(*a*) Campbell Hall
(*b*) Maybrook

To Central Vermont R.R. *via*

(*a*) Harlem River
(*b*) Mechanicville
(*c*) St. John's (Grand Trunk Route)

To Montpelier & Wells River R.R. *via*

(*a*) Mechanicville
(*b*) Rotterdam Junction
(*c*) Harlem River

To Rutland R.R. *via*

(*a*) Binghamton
(*b*) Mechanicville
(*c*) Norwood

To St. Johnsbury & Lake Champlain R.R. *via*

(*a*) Mechanicville
(*b*) Rotterdam Junction
(*c*) Harlem River

From the Central Freight Association points to the New England prorating groups *via* the routes mentioned, the following initial Central Freight Association Lines are used:

From Chicago *via* the N. Y. C. & St. L. R.R., Pennsylvania and Erie

St. Louis *via* the Wabash, Big Four and Pennsylvania

Cincinnati *via* the Big Four and Pennsylvania

Detroit *via* the Michigan Central, New York Central and a route through Toledo and the Pennsylvania R.R.

Grand Rapids *via* Pennsylvania, New York Central and Pere Marquette

Cleveland *via* the N. Y. C. & St. L., Pennsylvania and Erie

Indianapolis *via* Big Four, Pennsylvania and Erie

Youngstown *via* New York Central, Erie and Pennsylvania

These exhibits were introduced by the Pennsylvania R.R., New York Central R.R., Erie R.R., C. C. C. & St. L. R.R., N. Y. C. & St. L. R.R., Michigan Central R.R., Wabash Railway, and Pere Marquette Railway, respectively.

The defendants before the Interstate Commerce Commission complained that the New England Roads did not show how the immense traffic between the New Haven and the New York Central was divided. Not only were divisions on this traffic between many tonnage points and *via* several junctions introduced in evidence by the complainants, but the defendants largely supplemented these divisions by exhibits and testimony of their own. It is significant that the defendants in their reply to the complainants' petition for reargument admitted that the record contained an adequate summary as to New Haven–New York Central divisions. They there state that "these divisions are susceptible of a general summary because unlike other divisional arrangements with other Trunk Lines the entire New Haven Railroad, for the purpose of these divisions, is divided into two great groups." We particularly emphasize this admission (made after the first argument before the Commission) in view of the very complete showing of divisions between all percentage groups referred to above.

The first decision of the Commission (Rec. p. 82) states that "the principal interchange of the New Haven is with the Pennsylvania, Central of New Jersey, Lehigh Valley, and Long Island through Harlem River" and that "complainants have not submitted any evidence in respect of the divisions to points on the lines of the Lehigh Valley and the Long Island." This statement is very misleading. Exhibit 13 shows that these four are the only roads with which the New Haven has an interchange at Harlem River. Exhibits 10 and 12 show the amounts of traffic interchanged between the various New England Roads and each one of their connections. They indicate that the New Haven and Central New England interchange with the Long Island less than 1% of their total interchanged traffic and that out of their ten Trunk Line connections there is only one, the Delaware & Hudson, with which they interchange less traffic than with the Long Island.

With regard to the Lehigh Valley the amended complaint set forth rates and divisions between New Haven, Central New England, Boston & Maine and Maine Central points and points on or *via* the Lehigh Valley, and every one of the intervening New England railroads with the exception of the Maine Central introduced exhibits showing divisions between points on its line and Sayre, Pa., on the Lehigh Valley. As to the New Haven in particular, Exhibit 52 shows divisions between several points on both the New Haven and Central New England Roads and Sayre, Newark, Allentown and Rochester by the Lehigh Valley. Several exhibits introduced by the defendants, notably those of the C. F. A. Roads, show divisions by routes which include the Lehigh Valley.

The Central Railroad of New Jersey filed a separate brief and a separate reply brief before the Commission and Mr. Ewing, its Assistant General Freight Agent, filed an affidavit in the District Court (Rec. p. 908) alleging that insufficient evidence was shown to furnish a basis for any relief against it. The Commission's first opinion (Rec. p. 84) suggested that the evidence of divisions with the Central of New Jersey was meager. As a matter of fact, divisions exhibits introduced by each one of the present intervening New England railroads showed divisions with the Central Railroad of New Jersey on traffic which terminated or originated on the latter's lines and also on overhead traffic. In addition to this showing the Central Railroad of New Jersey filed several exhibits and introduced much testimony (for example, Rec. pp. 604–21 and Exhs. 89–91) showing joint rates, divisions and percentage blocks between all of its divisions groups and all of those on the more important New England Roads.

In discussing the divisions of the Central Vermont Railway the Commission in its first opinion (Rec. p. 80) says that there are in the record no divisions between Central Vermont points and the New York Central west of Buffalo and that there is comparatively little evidence of divisions east of Buffalo. This is an erroneous statement, inasmuch as the Central Vermont exhibits show divisions from Central Vermont points *via* Norwood to Syracuse on the New York Central and divisions from Central Vermont points *via* the Grand Trunk to Cleveland on the New York Central Lines West. The New York Central Lines West introduced Exhibit 157 in which they showed divisions between various C. F. A.

points and all of the New England railroads, among others the Central Vermont. This exhibit shows divisions between Grand Rapids and Youngstown on the New York Central Lines West and points on the Central Vermont. On the same page the Commission remarks that

> "the division of rates between the Central Vermont and the New Haven and Grand Trunk, respectively, are not shown."

The exact meaning of this sentence is hard to determine. There are no divisions shown of rates between the Central Vermont and the New Haven because such divisions are not in issue in this case. Many joint rates are shown *via* the Central Vermont, New Haven and other roads and many are shown *via* the Central Vermont, Grand Trunk and other roads. There are also rates shown between several Central Vermont points and the following points on the Grand Trunk: Detroit, Grand Rapids, Chicago, Montreal, Ottawa, Hamilton, Toronto and London. These rates are participated in only by the Central Vermont and the Grand Trunk and therefore the divisions received by those two roads are indicated.

The petition herein alleges in paragraph 16 (Rec. p. 10) that the record before the Commission does not show what divisions are now received out of joint rates by certain railroads including the Pittsburg & Lake Erie and the Toledo, St. Louis & Western. Attention is called to the fact that the Central Vermont exhibit shows joint rates and divisions from five points on the Central Vermont Railway to Youngstown, Ohio, on the Pittsburg & Lake Erie. Appendix B of the amended complaint (Petitioners' Exhibit

A herein) shows rates and divisions between five points on the Boston & Maine and St. Louis *via* the Toledo, St. Louis & Western. It has been stated by the roads which were defendants before the Interstate Commerce Commission that no divisions were shown upon official classification territory traffic between New England and the Norfolk & Western, the Chesapeake & Ohio or the Western Maryland. The record shows (p. 459) that very little traffic is interchanged between these roads and New England. It also discloses rates and divisions between several points on the New Haven and Central New England railroads and Atlanta and Birmingham *via* the Norfolk & Western, New Orleans *via* the Chesapeake & Ohio, and Birmingham and New Orleans *via* the Western Maryland.

In general it may be said that the exhibits and evidence introduced by all parties show a picture of through routes, joint rates and divisions between New England points and outside points chosen with reference to their tonnage importance and with reference to their territorial location in such a way as to give a complete and entirely illustrative picture of the whole situation. Divisions are shown between every division group in New England and practically every division group in Trunk Line and C. F. A. Territory as well as the South, Transcontinental Territory and Canada. In most cases several points within each group are shown, especially in New England, and in very many cases not only are representative points shown, but also the points at the two extremities of the group.

The record shows that the divisions received out of joint rates to or from all points in the same per-

centage group are the same. The percentage, the arbitrary deduction if any, and the prorating mileage are identical between every point in any one New England group, and every point in any given group outside New England. The only factor which varies from point to point within a group is the actual mileage.

The actual mileage is of course shown for all points between which divisions are shown. In addition to these points, actual mileages are shown to hundreds of other points, both in and out of New England. As is stated above, the complainants before the Commission submitted lists of their chief tonnage points. Many exhibits, chiefly those introduced by the defendants, show the actual mileages between all of these points and many others and the various New England gateways. In the same manner the actual mileages are shown between very many points on the defendant roads and the New England gateways. In addition to the exhibits referred to above setting forth actual divisions, the actual mileage to many other points is shown by the following exhibits among others: 71, 77, 79, 80, 83, 84, 86, 88, 92, 93, 94, 166, 191*a*, 194.

Mileage prorate, rate prorate and ton mile earnings for any point in any of the divisions groups can be determined from the record, provided it is a point of sufficient importance so that its actual mileage is shown. Such determinations, if desired by the Commission, could be made by a simple mathematical process from the actual mileage, and the prorating percentage for the group.

Thus the record sets forth a complete picture of the actual divisions received by the New England

Roads, and by the roads west of the Hudson to and from practically every point in New England and practically every prorating group in the highly competitive region constituting the remainder of the Eastern Rate Group.

APPENDIX E.

THE RECORD BEFORE THE INTERSTATE COMMERCE COMMISSION CONTAINED VERY FULL EVIDENCE CONCERNING THE REVENUE NEEDS AND OPERATING CONDITIONS OF EACH OF THE IMPORTANT TRUNK AND C. F. A. LINES.

The petitioners have claimed that the record before the Commission contains no evidence of the financial and operating conditions of the individual roads which were defendants before the Commission. They claim that the Commission's findings were based solely on group statistics. In this appendix we point out that this claim is erroneous. The Commission's conclusions were stated in the form of group figures because the Commission felt justified in dealing with the situation as a group matter. The Commission's conclusions, however, were based not on group statistics, but on figures for all the important individual carriers in Trunk Line and C. F. A. Territory, as well as in New England.

In the main body of our brief we have discussed the revenue needs, financial statistics, freight costs and operating conditions of the New England Roads individually, and of the New England Roads as a group, in comparison with their connections as a group. We here summarize briefly a portion of the evidence which was introduced before the Interstate Commerce Commission portraying conditions on the individual roads west of the Hudson River.

With regard to the *financial situation* and the

revenue needs of these roads, the following exhibits illustrate the sort of evidence which the Commission had before it:

Exhibit 6, which was based on the report of the joint accounting committee of the Trunk Lines and New England Roads submitted to the Commission in connection with *Ex parte 74*, shows for the year ending October 31, 1919, the property investment, the net income, the per cent. of return, the freight and switching revenue, and the amount and percentage of increase in freight revenue necessary to produce net returns of 6%. These figures are given for 25 Trunk Lines and 20 C. F. A. Lines individually, as well as for each of the New England Lines.

Exhibit 16 shows for 50 Trunk and C. F. A. Lines for the period of Federal control the operating revenues, operating expenses, net operating revenue, operating ratios (maintenance of way, maintenance of equipment, transportation and total), net Federal income, standard return for test period, and the comparison of net Federal income to standard return.

Exhibits 111 and 186 show for the New England Roads and 32 Trunk and C. F. A. Lines, the ratio of net railway operating income to property investment for the fiscal years from 1913 to 1917 inclusive, for the calendar year 1919, and for 10 months of 1920 equated to an annual basis, and for September, October and November, 1920, equated to an annual basis.

Exhibit 117 shows for the New England Roads and for 43 other Eastern Roads, the property investment in the aggregate, and per mile of road, as of October 31, 1919.

Exhibit 122 shows for 40 Trunk and C. F. A. Roads

a statement of freight and passenger revenue for October, 1920.

Exhibit 124 shows for 29 Trunk and C. F. A. Lines the estimated result of increased rates, based on the year ending October 31, 1919, indicating property investment, estimated net railway operating income and the ratio between them.

Exhibit 125 shows for 33 Trunk Lines and 26 C. F. A. Lines, as well as for the N. E. Lines, operating revenue, operating expenses and operating ratios for 10 months of 1920.

Exhibit 127 shows for all roads in the country with an annual operating revenue of $1,000,000 or more, the operating revenues, operating expenses, net operating revenues, taxes and net operating income for the calendar years 1918 and 1919. The same exhibit also shows for the same roads, the standard return for the test period, and the amount by which the 1919 net operating income exceeded or fell short of the standard return.

With regard to *operating conditions* and *costs*, the evidence before the Commission may be illustrated by reference to the following exhibits:

Exhibit 17 for the calendar year 1918 shows traffic density and average haul for each New England Line and for each of 50 Trunk and C. F. A. Lines. These figures indicate separately for each road the average miles of road operated, the ton miles of revenue freight, the tons of revenue freight, the ton miles per mile of road and the average haul.

Exhibit 112 shows for the New England Roads and for 64 Trunk and C. F. A. Lines the average receipts per ton for the fiscal years 1915 and 1916, and the calendar years 1916 to 1919 inclusive.

Exhibit 113 shows average receipts per ton mile for the same roads and years.

Exhibit 114 shows average haul of revenue freight for the same roads and years.

Exhibit 116 shows for the New England Roads and 43 Trunk and C. F. A. Lines, the ratio of switch tracks to all tracks operated on December 31, 1919, and the ratio of yard switching locomotive mileage to total locomotive mileage for the calendar year 1919.

Exhibit 131 shows for each New England Line and for each of the Trunk Lines having a direct interchange with the New England Lines, the total freight traffic movement for each road, and the distribution of this traffic as between various sorts of tonnage for the year 1918.

Exhibit 132 shows for 1918 the road freight locomotive mileage, the train switching and the yard switching locomotive mileage for each New England Line and for each road having a direct interchange with New England.

Exhibit 133 shows for 1918 the miles of road operated, and the miles of main tracks, yards and side tracks, for each New England Line and for each road having a direct interchange with New England.

Exhibits 107–110 show for individual Michigan Roads various statistics such as cost of per diem, cost of fuel and fuel transportation, and density of traffic.

The *amounts and proportions of traffic interchanged* by each New England Road with each of its Trunk Line connections are shown in Exhibits 10 and 12.

The petitioners have made a special point in re-

gard to two of the petitioning roads, namely, the Erie and the Central Railroad of New Jersey. With regard to the Erie, they argued that the rate of return received by the Erie is even less than that received by the New England Roads, and that in consequence the Erie's divisions with New England should not be decreased. In support of this contention, the Erie Road introduced exhibits before the Commission numbered 96 to 101 inclusive, in which were compared certain statistics for the Erie, the New Haven, and the New England Roads as a group. These statistics show investment and income, relation of fixed charges to estimated net income for adjusted year ended June 30, 1920, condensed income account for the period of Federal control, revenues, expenses and net railway operating income for 1919 and 1920, operating revenues, expenses and ratios for the test period and the period of Federal control, and fuel costs for 1919.

In this connection we call attention to certain matters that appear in the record before the Commission. The Comptroller of the Erie Railroad, Mr. Sorensen, admitted on cross-examination that the investment of the Erie per mile of road was over $207,000* and that if the Erie had only the same investment per mile of road as the New England Roads, it would show a very handsome return (Rec. p. 637). He admitted that on the figures shown in his own exhibits, the New Haven suffered much more severely between 1919 and 1920 than did the Erie. For instance, in 1919 the New Haven had a net railway operating income of $6,000,000,

*Defendant's Exhibit 117 gives it as $216,043.

the Erie $800,000. In 1920 the New Haven had a deficit under fixed charges of $9,448,000; the Erie a deficit of $11,873,000, a falling off for the New Haven of over $15,000,000. For the year ending June 30, 1920, he admitted that the Erie had a net railway operating income of 1.64% on property investment, while the New England complainants had a net railway operating income of only 1.04% (Exh. 96).

The Central Railroad of New Jersey asked for special consideration before the Commission and also before this court on the ground that statistics show that it is more in need of increased divisions than are the New England railroads. In reply to this contention we wish to point out that the record shows that the Central Railroad of New Jersey is controlled by the Reading, and that the Reading is substantially owned by the Baltimore & Ohio and New York Central (Rec. p. 613). Furthermore the natural route of interchange between the Baltimore & Ohio or the Reading and New England is over the Central Railroad of New Jersey. With regard to all of the traffic between New England and these two roads, therefore, the Central of New Jersey is a bridge carrier. Its haul on this traffic is only 16 miles from Allentown to Easton, which accounts for the fact that its average haul is low (Rec. p. 605). The Central of New Jersey has complained because the New Haven insisted upon changing the gateway for much of its interchanged traffic from Harlem River to Maybrook, and that this deprived the Central of New Jersey of a large part of its haul and diverted the traffic to the Lehigh & Hudson River Railroad. We wish to point out that a witness for the Central of New Jersey admitted that the

Lehigh & Hudson is controlled by the Pennsylvania, the Baltimore & Ohio, the New York Central, the Erie and the Central Railroad of New Jersey (Rec. p. 615).

The Central of New Jersey introduced Exhibit 207 into the record, setting forth for the calendar year 1919 a comparison between itself, the New Haven, the Boston & Maine, and the New England Roads as a group, in which it showed various items of freight service, taxes, equipment facilities, property investment and average revenues per various units, as well as operating ratios and percentage of income. This exhibit shows that the investment per mile of road on the Central of New Jersey is $240,172 as against $106,888* for the New England Roads, but that in spite of this difference, the operating ratios for September, October and November 1920, the last three months of actual statistics, are lower for the Central of New Jersey than for either of the New England Roads separately, or for the New England Group, the average for the three months being about 85% for the Central of New Jersey as against about 94% for the New England Group.

We wish also to suggest that the order of the Commission makes it entirely possible for the Erie or the Central of New Jersey to bring their special circumstances to the attention of the Commission with a view to the modification of the order with respect to them if they shall so desire. In fact, since

*Defendant's Exhibit 117, from which these figures in Exhibit 207 are taken, shows that this figure for New England includes the Boston & Albany with a property investment of $196,239 per mile, as well as the Canadian Pacific and the Grand Trunk. Eliminating these roads the figure would be $103,537 per mile.

this case was decided by the District Court the Erie has filed a petition before the Commission asking for a general increase of its divisions on traffic interchanged with the New England Roads.

Signed Copy

Supreme Court, U. S.
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CLERK

No. 646.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE AKRON, CANTON AND YOUNGSTOWN RAILWAY COMPANY ET AL., APPELLANTS,

v.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, AND BOSTON AND MAINE RAILROAD ET AL., APPELLEES.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

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For Interstate Commerce Commission.

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JANUARY, 1923.

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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE AKRON, CANTON AND YOUNGSTOWN Railway Company et al., appellants,
v.
THE UNITED STATES OF AMERICA, THE Interstate Commerce Commission, and Boston and Maine Railroad et al., appellees.
No. 646.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

STATEMENT OF THE CASE.

Seven trunk lines reach the Hudson River from the West. These are the Delaware & Hudson, the Erie, the Lackawanna, the Lehigh Valley, the Jersey Central, the New York Central, the Pennsylvania and in addition there is the Baltimore & Ohio, an important trunk line which reaches the Hudson River through the medium of the Reading and the Jersey Central as connections.

The location of these trunk lines, as well as of the lines in New England, is shown on the map in the appendix.

The first five of these trunk lines, together with a very considerable number of lines connecting with them at various points, filed the petition herein against the United States praying the court to set aside the order of the Commission requiring an increase in the divisions accruing to certain New England lines on through traffic interchanged with the trunk lines at or near the Hudson River. The Pennsylvania Railroad Company and its subsidiaries and the Baltimore & Ohio Railroad Company did not join in the suit.

The petitioners moved in the District Court for an interlocutory injunction.

(a) THE DECISION OF THE COURT BELOW.

The District Court, Circuit Judges Hough, Mayer, and Manton sitting, denied the application for the interlocutory injunction restraining the enforcement of the Commission's order. The Court in its opinion discussed the proceeding before the Commission and the meaning of the Statute and stated:

> There is nothing contained in section 15 (6) which prohibits the Commission from dealing with the matter of divisions in a practical way and nothing which makes it mandatory upon the Commission at the same time to take up an unworkable task in thus dealing with all of the subdivisions about which there may be no complaint whatever. This record has

made it plain that the New England Group, so called, presents a transportation situation in a district clearly separable from other districts by a variety of controlling conditions. The Commission had the power to deal broadly with the question of primary divisions at the Hudson River on through traffic between New England points and the rest of the country. Section 15 (6) authorizes the Commission to take up and deal with the question of this primary division at the Hudson River and does not compel the Commission at the same time to deal with all subdivisions. It was found in the past to be a reasonable and helpful practice on the part of carriers as well as on the part of the Commission to deal with divisions of through rates from one well-defined district of the country to another on the basis of the primary division at the gateway between the two districts. It is the practical way to deal with the situation in view of the various number of different routes. (*Pitts. & W. Va. R.* v. *Pitts. & L. E. Ry.*, 61 I. C. C. 272; *N. J. P. R. & T. Co.* v. *C. R. R. of N. J.*, 63 I. C. C. 80.) We think that section 15 (6) in effect does not require the Commission to make an independent conclusion as to each carrier and as to the division of each joint rate. If it considers together the various carriers and various divisions and reaches a conclusion equally applicable to such carriers and divisions, its order is valid and enforceable under the act. (Record, p. 946.)

The Court further said:

> Undoubtedly the Commission has a wide discretion to determine when the evidence before it is sufficiently typical and when the surrounding conditions justify a broad and comprehensive treatment in the matter of divisions of rate as well as rate making. We find nothing in the record before the Commission in this case to justify any claim of an abuse of that discretion, and the record does disclose that sufficient reasons were advanced of a nature compelling to the Commission why it should deal with the subject in a comprehensive manner, such as it did deal with it, and there is nothing to indicate that any conclusion substantially different in its broad outlines could have been arrived at by additional detail and study. (Record, p. 947.)

The Court also held that no just complaint could be made of the order because it was temporary and provisional, and pointed out that the practice of the Commission in making a comprehensive order and providing for the correction of such injustice as might be found to arise in detail in connection therewith was sustained by authority.

(b) COMPLAINT BEFORE THE COMMISSION.

The Commission's order was made in a proceeding instituted by a complaint wherein the New England railroad companies (other than the Boston & Albany Railroad Co., whose property is leased to and operated by the New York Central Railroad Co.) were complainants against all the trunk lines above mentioned and their connecting lines.

This complaint set forth the vital public importance of complainants' transportation service; the minimum value of their transportation properties; the amount of revenue required to pay the operating expenses, taxes, and a fair return on their said properties; that for the year ending August 31, 1921, it was estimated that their operations would yield $36,000,000 less than such fair return and $18,000,000 less than the amount necessary to meet their fixed charges; that New England had certain peculiar geographical, industrial, and economic conditions affecting rail transportation; that due to such peculiar conditions and particularly to the fact that complainants were, to an unusual degree, originating and terminating lines, their unit operating costs were necessarily higher than those of the defendants and were not now properly reflected in the divisions of the joint rates as between the complainants and the defendants; that complainants had been unable to obtain a more favorable readjustment of such divisions by urging such readjustment upon the most directly interested defendants; that the divisions received by complainants were unjust, unreasonable, and inequitable; and they prayed the Commission to prescribe the just, reasonable, and equitable divisions of such joint rates. (Record, pp. 14–18.)

The complaint also pointed out that in *Increased Rates, 1920*, 58 I. C. C. 220, known as *Ex Parte 74*, the New England Railroads had been included in the same group with the trunk lines and their connections north of the Ohio and east of the Missis-

sippi, and by reason of the resulting inclusion of complainants' property investment accounts and complainants' requirements in such rate group, the increased revenues accruing to the carriers in that group other than the New England Lines would be approximately $25,000,000 per year in excess of what they would have been if they had not had the benefit of the inclusion of complainants in such group. (Record, p. 16.)

The commission indicated that the complaint was too general, and thereupon an amended complaint was filed. (Record, p. 29.)

This amended complaint reiterated the allegations of the original complaint and in addition set forth (Record, p. 31) the fifth class rates on westbound traffic and the revenue accruing therefrom to complainants and defendants, respectively, on traffic moving between representative points in New England and representative points in other sections; alleged that the bases of divisions with respect to other classes of traffic and to eastbound traffic were relatively the same; alleged that the relative divisions so shown were to a large degree typical of those accruing from rates on commodities moving in large volume and enumerated a large number of these commodities. (Record, p. 32.)

(c) CHARACTER OF EVIDENCE BEFORE THE COMMISSION.

The Commission conducted extensive hearings, the evidence produced covering 2,798 pages in addition to 207 exhibits.

There is no claim on the part of petitioners that the record does not fully show the conditions as to the interested New England carriers both in combined form and individually. We shall not, therefore, summarize the evidence in this connection, especially since it is fully dealt with in the brief for the New England intervening carriers.

As to the railroads west of the Hudson River in Trunk Line and C. F. A. Territories,[1] the record shows, among other things, evidence along the following lines:

There was evidence as to each Class I carrier (except perhaps a few of the very small ones), shown both individually and in the aggregate, on the following points among others:

Property investment.

Property investment per mile.

Operating revenues.

Operating expenses.

Net operating income.

Ratio net railway operating income to property investment.

Operating ratio.

Tons of freight.

Tons per mile of road.

Average receipts per ton.

[1] Trunk line territory may be roughly described as the territory east of a line drawn through Buffalo and Pittsburgh, west of New England and north of the main line of the Norfolk & Western Railway. C. F. A. or Central Freight Association territory may be roughly described as the territory lying west of the Buffalo-Pittsburgh line, east of the Mississippi River and north of the Ohio River, excluding nearly all the State of Wisconsin and the northern peninsula of Michigan.

Average receipts per ton-mile.

Average haul.

Cost of coal.

(Exhibits 6, 16, 17, 20, 24, 28, 111, 112, 113, 114, 117, 125, 172, 173.)

There was a great variety of other important evidence relating to the traffic interchanged with each of the Trunk Lines interchanging with the New England lines at or near the Hudson River. This evidence showed separately coal and merchandise, showed separately traffic via each Hudson River gateway, showed the revenue accruing to the New England carriers and the balance accruing to the carriers west of the Hudson River, showed the traffic originating on each of such lines, and showed also the road and switching locomotive mileage. (Exhibits 9, 9a, 10, 11, 12, 13, 131, 132.)

There was evidence comparing New England with the balance of the eastern district in the matter of—

Net ton-miles.

Freight-train miles.

Freight locomotive miles.

Freight-car miles.

Per cent of loaded to total car miles.

Empty car miles.

Freight cars per train.

Tons per loaded car.

Tons per car mile.

Tons per train.

Cars on line daily.

Freight locomotive performance.

Freight yard costs.

Freight train costs.

Property investment per million revenue ton-miles. (Exhibits 20, 21, 22, 23, 140, 148.)

In addition, there was specific testimony by officers of each of the seven Trunk Lines reaching the Hudson River, giving a great deal of evidence as to their necessities and operating conditions, and there was also evidence of a similar character as to the Baltimore & Ohio.

It appeared that 88 per cent of the total traffic interchanged by the New England railroads with railroads west of the Hudson River originates in, or is destined to, Trunk Line and C. F. A. territories, and that about 50 per cent of such entire interchanged traffic is carried via the New York Central system and the Pennsylvania system. (Exhibits 9 and 14.) The map appended to this brief shows how completely practically every part of Trunk Line and C. F. A. territories is reached directly by the systems reaching the Hudson River.

There was evidence as to the interchanged freight traffic between New England and Trunk Line territory, C. F. A. territory, Western territory, and Transcontinental territory, respectively. (Exhibit 14.)

There was also evidence introduced by the defendant companies making a comparison of the railroads in the New England district with railroads in various regions and districts covering the entire continental

United States, these statistics showing very fully the train and locomotive performance in each region. (Exhibit 135.)

As to the lines west of Chicago and the Mississippi River, it appeared that they enjoyed a basis of divisions not only more favorable than the New England lines but also more favorable than was enjoyed by the lines between the Hudson River and Chicago and the Mississippi River.

As to the Southern lines, it appeared that while in *Ex Parte 74* they had received an increase of only 25 per cent on their local traffic, they had received an increase of 33 per cent on through traffic moving between their territory and points in New England.

Although all the Western and Southern railroads were made parties to the proceeding, practically none of them took enough interest in the proceeding to appear before the Commission. None of the Southern railroad companies of substantial size or importance has joined in the petition herein, and the only Western railroad of substantial size and importance which has joined in the petition herein is the Kansas City Southern Railroad Company.

On the subject of divisions between the complainants and defendants, the complainants introduced exhibits showing the divisions of several thousand joint rates applying between typical points in New England and typical points throughout the United States. In addition to the divisions specifically placed in the record, the blocking systems which were elaborately explained formed the bases for thousands of divisions

of joint rates between points in New England and points throughout the United States.

We quote as follows from the Record of the testimony of Robert C. Wright, General Traffic Manager of the Pennsylvania Railroad System, and Chairman of the Traffic Committee having in charge the traffic features of the case so far as they involved the Trunk Lines (Record, p. 505):

> Witness has examined the various statements of the complainant companies' witnesses, with a view to considering the conclusions that he thinks are proper as to the reasonableness of those divisions.
>
> In the first place, witness started to make up some statements himself, but came to the conclusion that the statements put in by the New England roads were not prejudicial in any way. However, he would not use the word "typical" in describing them. He does not believe any separate division is typical of a divisional arrangement. The divisional arrangement must be taken as a whole. He thinks the exhibits of the New England roads are fairly illustrative. They are not put in to give advantage to one side or the other. He is perfectly willing to deal with those exhibits as they were put in. (Record, p. 507.)
>
> Witness does not mean in each individual instance. He wants to make it clear that in considering the question of rate divisions, you can not take individual instances. No individual instance is typical. (Record, p. 508.)
>
> In saying "taken as a whole," witness in this particular case means between the New

> England carriers and all other carriers, but he would also mean it as between the New Haven and the Pennsylvania, or as between the New England carriers and all other carriers, on all traffic. (Record, p. 509.)

We make these excerpts to bring out this concession upon the part of the Chairman of the Trunk Lines Committee that divisions should be considered as a whole between the New England carriers and all other carriers and that the divisions presented by the New England carriers were fairly illustrative. We do not mean to imply that this witness did not support the contention of the Trunk Lines upon the question of fact as to whether the divisions as between the New England carriers and all other carriers were reasonable.

Mr. H. S. Bradley, who appeared as the Chairman of the Committee of C. F. A. lines to supervise and direct an analysis of divisions between lines in C. F. A. territory and the New England lines, testified at length concerning the extensive exhibits introduced by complainants as to divisions of rates between New England and C. F. A. territory, and introduced various other exhibits dealing with this subject. (Record, pp. 689, 756.)

The sufficiency, and indeed the elaborateness, of the evidence concerning divisions will be fully shown in the brief for intervening New England carriers.

Bearing on the evidence as to divisions, we quote as follows from the Commission's report, which is made part of the order herein:

With respect to the latter, complainants submitted exhibits showing the division as between the New England roads and their western connections of several thousand joint rates applying between every division block of complainants other than the Bangor & Aroostook and representative points of traffic importance in all parts of the eastern group. One of the principal witnesses for defendants testified that the selection was illustrative and fair. Similar information was submitted by complainants with respect to various transcontinental rates and rates to and from the south, but no evidence was offered by defendants operating in southern or western territories. (Record, p. 115.)

(d) **REPORT AND ORDER OF THE COMMISSION.**

The Commission's report accompanying its order held that—

Complainants perform their part of the interchange service under less favorable conditions than their connections west of the Hudson River. They are terminal lines; their hauls are short; their traffic splits at different junction points and is diffused over many secondary and branch lines; their trainloads are necessarily relatively light; the density of their freight traffic is relatively low; and while their investment per mile of road is low, their investment per revenue ton-mile is relatively high. Moreover, no coal mines are located on their rails, and fuel and many other supplies must be brought from considerable distances.

The Commission held that these unfavorable conditions had long existed; that they had been the cause of a disproportionate increase in the burden upon the New England lines, as compared with their connections, during the preceding three years due to the disproportionate increase in the cost of fuel and to the disproportionate effect in the labor cost per ton-mile resulting from the heavy increases in wages.

The Commission held that the divisions in question had existed for many years and without complaint until the extraordinary changes of the preceding three years and held that it was a reasonable assumption that such divisions had until those changes produced on the whole results which were fair.

The Commission examined the evidence relative to the reasonableness of the divisions prior to the extraordinary changes of the past three years and held that there was nothing in the evidence tending to overthrow the presumption that, prior to such extraordinary changes, the divisions produced fair results and were not unduly favorable on the whole to the New England carriers. The Commission held that the further evidence with regard to the effect of the recent extraordinary changes led inevitably to the conclusion that the scales which formerly had hung approximately level had now been tipped against the New England roads and in favor of their western connections because these changes had produced disproportionate burdens in New England; and pointed out that the New England carriers were

in greater financial need than any other group of important carriers in the country. The Commission referred to the absence of evidence with respect to divisions on coal and certain other traffic; pointed out that defendants had made no offer to prove that such divisions were so favorable to complainants as to make up deficiencies suffered by complainants in respect of other traffic, and held that the absence of evidence as to such divisions constituted no reason for failure to act upon the divisions as to which there was evidence. The Commission further held that the financial needs of the New England lines were not ascribable to the low level of their local freight or passenger rates.

The Commission pointed out that while there was need for a thorough revision of divisional arrangements upon a more logical and systematic basis, such revision could be consummated only after prolonged delay, and that meanwhile the Commission could and should grant a horizontal increase in the divisions to the complainants so as to give them within conservative limits the substantial justice to which they were entitled. The Commission also pointed out that with reference to both rate increases and rate reductions it had been its practice to make horizontal changes even though individual rates might still be left either too low or too high and in need of further readjustment and that in such cases it had made provision for such readjustment. (Record, pp. 117–118.)

The Commission pointed out that in *Increased Rates, 1920, Ex Parte 74*, it had appeared that, prior to the increase of wages in 1920, the New England lines required an increase of about 47.5 per cent in their freight revenues to meet their needs, while the other carriers in the eastern group required an increase of but 28 per cent; and that the Commission authorized a uniform increase throughout the eastern group which in practice amounted to about 37 per cent. The increase authorized by the Commission took into account the additional needs of the carriers, due to increased wages.

The Commission pointed out that under such circumstances it would not have been unfair to provide that one-half of the increase on merchandise interchange traffic moving between New England and the rest of the country (instead of one-third, as appeared actually to have been realized) should accrue to the New England lines, and that this would have represented about $7,500,000 a year.

The Commission held that an amount of $7,500,000 "falls well below any estimate of the disproportionate burden which the New England lines have suffered in the past three years by reason of the extraordinary changes in rates and wages."

The Commission further stated that if the divisions now received by the complainants on the traffic under consideration were increased by 15 per cent, the estimated result would be an increase in revenue of not exceeding $7,500,000.

The Commission therefore found that the divisions of the joint class rates under consideration would for the future be unjust, unreasonable, and inequitable to the extent that complainants' divisions thereof should be less than 115 per cent of their present divisions (subject to a limitation set forth in the order for the protection of the carriers west of the Hudson, where the New England lines received more than 50 per cent of the total rate).

The Commission further found that the just, reasonable, and equitable divisions to be received by the several other carriers participating in said joint rates would be for the future the amounts remaining of the joint rates over and above the divisions so to be received by complainants, to be divided among such other carriers as they might agree or, failing such agreement, as might be determined by the Commission upon application therefor.

The Commission enjoined upon complainants and defendants the necessity for proceeding as expeditiously as possible with the revision of divisions upon a logical and systematic basis, made specific suggestions as to the character of the study of the subject and invited the carriers to present to the Commission any cases of inability to agree upon such revision.

In effect the Commission ordered a horizontal increase in the divisions to the complainants and left the door open for correction of any possible injustice and also for further improvement of the whole basis of the division structure.

The order which the Commission made, and which is attacked in this proceeding, was made as a result of a second report by the Commission and it is this second report which is made a part of the order.

The Commission in its first report had reached a different conclusion, but, as is indicated in appellants' brief, the Commission's second report was a complete reversal of its first report. Therefore, it is the second report which, together with the order, constitutes the action taken by the Commission. Notwithstanding appellants' recognition that the second report was a complete reversal of the first report, appellants make twenty or more references in their brief to the expressions of opinion contained in the first report, thus evincing a purpose which pervades their entire brief to reargue in this court not only questions of law but also inferences from the facts before the Commission as to which the Commission's conclusions are final.

ARGUMENT.

I. JUDICIAL REVIEW OF THE COMMISSION'S ORDERS.

It may be convenient to cite a few of the leading cases expounding the doctrine as to the judicial review of the Commission's orders.

See *Interstate Commerce Commission* v. *Illinois Central Railroad*, 215 U. S. 452, at 470; *Interstate Commerce Commission* v. *Union Pacific Railroad*, 222 U. S. 541, at 547; *United States* v. *Louisville & Nashville Railroad*, 235 U. S. 314, at 320; *O'Keefe* v. *United States*, 240 U. S. 294, at 303; *Seaboard Air Line Railway Co.* v. *United States*, 254 U. S. 57, at 62.

We believe the doctrine of these cases may be briefly summarized as follows: The courts will not set aside an order of the Commission unless it is in violation of the constitution or in violation of the statutory authority delegated to the Commission; but an order made without evidence to support it would violate the statute and doubtless the constitution; and an order substantially in violation of the constitution or the statute, though formally purporting to comply therewith, may be declared void as an arbitrary exercise of power. The very purpose for which the Commission was created was to bring into existence an expert body which from its peculiar character would be most fitted to decide the questions confided to it. The Commission as an expert body can draw inferences which may not be obvious to others. Where an order is within the limits of the constitution and the statutes, the courts will not review the wisdom or the expediency of the Commission's order, or substitute their judgment for that of the Commission, even where it is conceded that the facts would have supported a finding contrary to that reached by the Commission.

II. APPELLANTS' ATTACK ON THE COMMISSION'S ORDER RESTS UPON MISCONSTRUCTION OF SECTION 15 (6).

Appellants assert various reasons for their claim that the Commission's order is void. They say it was not really an order concerning divisions at all, but merely a method of transferring revenues to the New England lines; that it was also a mere provisional order in advance of any decision about the

divisions; and that it was also in violation of the Divisions Clause—Section 15 (6)—of the Act to Regulate Commerce as amended, both because it did not deal independently with the divisions on each of the numerous through routes and because it did not fix all the countless subdivisions of the joint rates as well as the main division at the Hudson River. But their arguments as to the order being a mere transfer of revenues or merely provisional and not a decision of the question as to divisions really rest principally upon their misconstruction of Section 15 (6). They claim that Section 15 (6) does not authorize such an order and therefore they argue that the order must be characterized in some other way than as a decision under Section 15 (6). Appellants' misconstruction of Section 15 (6) is therefore fundamental in any discussion of this appeal. Hence we shall deal first with the two respects in which appellants claim the order was not permissible under Section 15 (6), and in doing this it will be helpful to refer at length to some important phases of the subject matter of divisions—a topic which so far has not called for extensive consideration by the courts.

III. THE COMMISSION MAY FIX MAIN DIVISIONS WITHOUT AT THE SAME TIME FIXING SUBDIVISIONS.

One of the grounds of appellants' attack on the Commission's order is that the order is arbitrary because it confines itself to dealing with the main or primary divisions of the through rates at the Hudson River and does not prescribe all the subdivisions accruing out of the divisions west of the Hudson

River to the vast number of different links in the different routes west of that river.

Appellants base this contention upon the claim that Section 15 (6) must be so construed as to compel the Commission, if it acts at all, to apportion the through rate among all the participating carriers; that with reference to this task the Commission must carry it through and must prescribe the proportion to be received by each of the carriers, unless they consent otherwise.

Section 15 (6), with the exception of an intermediate clause, which has no bearing here, reads as follows:

> Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, * * *. In so prescribing and determining the divisions of joint rates, fares, and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their rail-

> way property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge.

To illustrate this question of construction concretely and simply, assume that a through route east and west of the Hudson is made up of two connecting carriers east of the Hudson and of three connecting carriers west of the Hudson. Assume that the two connecting carriers east of the Hudson complain against the three connecting carriers west of the Hudson and say that the main division of the through rate at the Hudson is unreasonable.

Appellants contend in effect that such a case would not be within the jurisdiction of the Commission under section 15 (6), and that the Commission could not proceed without broadening the issue to inquire what would be the reasonable subdivision between the two New England carriers of the portion of the through rate accruing east of the Hudson, and what would be the reasonable subdivision between the three other carriers of the portion of the through rate accruing west of the Hudson.

We submit that such a construction does violence to the literal effect of the provision which would be fully satisfied by the Commission proceeding to deal

with the only complaint presented to it. The Commission, disposing of the complaint as presented, would decide upon the reasonableness of the main division of the joint rate "as between the carriers parties thereto" and upon how the through rate should be divided or severed at the main point of division for the benefit of the "several carriers," i. e., the carriers east of the Hudson representing one part of the severance with which the Commission would be dealing and the carriers west of the Hudson representing the other part. The word "several" is merely descriptive of the character of the Commission's action; being a question of division the Commission will of course show how it divides the rate as between the carriers on the two sides of the dividing line; but the word "several" is not a mandate that the Commission must make further subdivision which the controversy does not demand, for the sake of being able to specify separately each individual carrier to which any possible subdivision might accrue. In a remedial statute like this certainly the court will not read into the language a proviso that the Commission can not deal with a broad controversy unless at the same time it develops all the possible ramifications which such a controversy might, but does not in fact, present.

Appellants' contention goes to the further extreme position that not only must the Commission consider the subdivisions which are not in controversy as well as the main division which is in controversy, but it must consider these subdivisions contemporaneously

with its consideration of the main division. In fact in the present case the Commission expressly kept itself in position to deal with the subdivisions when and as occasion should arise, and indicated that if the carriers west of the Hudson were unable to agree upon an absorption of the reduction in the main division, the Commission would deal with the subject. Appellants, however, insist that the Commission has no discretion to postpone a controversy which does not arise until it arises, but must precipitate such a controversy and deal with it before it proceeds to apply a remedy in respect of the only controversy before it. There is nothing in the langauge of the section 15 (6) which seeks thus to restrict and paralyze the Commission's action.

The last sentence of section 15 (6) enumerates certain elements to which the Commission "shall give due consideration, among other things." It is clear that the enumeration of these elements was placed in the statute for the purpose of making sure that the Commission did not unduly confine itself to a mileage basis of constructing divisions, but should view other and broader considerations of great importance to the maintenance of the public service. Appellants' contention seeks to turn this sentence into a limitation, whereas it is in fact designed to insure a broader outlook on the part of the Commission.

There was no practical reason why the Commission, when dealing with the complaint as to the main or primary division at the Hudson River should deal

with the subdivisions west of the Hudson River. They were not complained of by the complainants or by any of the defendants. The Commission had the right to deal with the subject matter presented to it without clogging the proceeding by taking up things not presented and not necessary to the case.

Appellants say that while the lower court spoke of "primary divisions," at the Hudson River, the Commission did not do so, and that there is no evidence in the record that primary divisions at the River were ever made as to any through traffic effected. While *the words* "primary divisions" were not used in the Commission's report, the report and the record are permeated with the idea.

The complaint, the amended complaint, and the testimony dealt with divisions at the Hudson River as the fundamental question as between the New England lines on the one hand and the lines west of the Hudson on the other. Both sides were interested in the question of division of the joint rates at the gateways between the New England lines and the other carriers, these gateways being, broadly, the gateways on or near the Hudson. The elaborate historical discussions contributed by the witnesses were with reference to the divisions at these gateways. The complainants, as well as the defendants, evinced no interest in the question of subdivisions of these joint rates at points west of these gateways. The record shows from one end to the other that the primary question in the making of these joint rates originally, as well as in the present controversy, was

the division of the joint rates east and west of these gateways.

1. The Subject Matter.

Appellants' construction of section 15 (6) is not only contrary to its natural meaning but when considered with reference to the subject matter will be found largely to destroy the remedial value of the provision and render it unworkable.

A view of some striking examples of the subject matter with which section 15 (6) deals will be useful.

Take for example traffic moving on a joint rate from San Francisco to New York. The principal division of this joint rate is at Chicago or at the Mississippi River gateway through which the traffic moves. There may then be a vast number of different subdivisions of this main division west of Chicago or the Mississippi River, and a vast number of subdivisions of the main division east of Chicago or the Mississippi River, depending upon the particular route by which the traffic moves and upon the links which make up parts of that route.

Appellants' contention in effect is that section 15 (6) would prohibit the Commission from reaching a conclusion as to what is a just and reasonable main division of this through transcontinental rate at Chicago unless at the same time the Commission examines every possible subdivision which might be made.

Such traffic from San Francisco to New York may move over the Western Pacific or Central Pacific from San Francisco to Ogden, over the Denver & Rio

Grande from Ogden to some point in Colorado and thence (*a*) via the Missouri Pacific to Kansas City and via any one of several different lines from Kansas City to Chicago or (*b*) via the Burlington or the Rock Island or the Santa Fe directly from Colorado to Chicago; or such traffic may move east of Ogden via the Union Pacific to Omaha and thence via any one of several different lines to Chicago; or such traffic may move from San Francisco via the Southern Pacific to El Paso, the El Paso & Southwestern to point of connection with the Rock Island and the Rock Island to Chicago, or may move from El Paso or other points on the Southern Pacific via any one of numerous different routes to New York; or such traffic may move from San Francisco to Chicago via the Santa Fe. East of Chicago such traffic may not only move via any one of several trunk-line systems extending all the way from Chicago to New York, but it may move by any one of a bewildering number of different combinations of connecting lines. Likewise such traffic may move via any one of a large number of different combinations of routes from San Francisco to St. Louis and then via any one of a very large number of combinations of different routes from St. Louis to New York. Such traffic may also move via other gateways, such as Memphis or New Orleans, between the West and the East.

Yet the practical necessities of the situation have resulted in the transcontinental rates from San

Francisco to New York (as well as from Seattle, Portland, Tacoma, Los Angeles, and a vast number of other points on or near the Pacific coast to New York, and as well as the traffic from each of those western points to each of the various Atlantic ports and points on or near the Atlantic seaboard), being primarily divided at Chicago or at the Mississippi River.

The broad question of the primary divisions of these rates east and west of Chicago on traffic moving via Chicago and east and west of the Mississippi on traffic moving via Mississippi River gateways would have to be treated as a principal problem, without undertaking the hopeless task of considering at the same time every one of the thousands of subdivisions of those rates accruing to each of the thousands of different possible links in the vast number of different routes over which such traffic may move.

A glance at the map will indicate that necessarily a similar situation arises with respect to traffic moving from points in the Southeast to points north of the Ohio River, and that the question of primary divisions at the Ohio River must be dealt with broadly without awaiting a separate consideration of the endless number of different subdivisions of those rates south of the Ohio River and north of the Ohio River, respectively. This situation is illustrated by *Sloss-Sheffield Steel & Iron Co.* v. *L. & N. R. R. Co.*, 35 I. C. C. 460, decided in 1915.

In that case the Commission had ordered a reduction in the rates on pig iron from Alabama and Ten-

nessee blast furnaces to all points north and east of the Ohio River crossings. The lines north and south of the Ohio River were unable to agree as to how the divisions of the joint rates should be modified so as to absorb this reduction and the lines north of the Ohio River declined to assume any part of the reduction. Thereupon the Commission reopened the case to deal with the divisions, and added a large number of additional parties defendant. Although it was manifest that great numbers of these rates would not only be primarily divided at the Ohio River but variously subdivided between connecting lines north of the Ohio River, apparently as a matter of course and by common consent the commission dealt broadly with the problem before it without assuming the unnecessary and almost impracticable task of considering at the same time all possible subdivisions of those primary divisions.

The case cited is a valuable illustration of the practical necessities inhering in such a subject matter. The fact that all the parties felt impelled to agree to this method of handling the matter simply emphasizes these practical necessities. The question whether under the law applicable in 1915 the Commission would have had the power in the face of objections of the parties to deal with the main division in controversy without also dealing with the subdivisions not in controversy did not arise and is not important. But on principle it would seem that if the Commission had the right to reduce the joint rate it had the power to

pass in a practical way on the primary division of that rate, just as the carriers would have done, without hampering itself by dealing with subdivisions not in controversy.

We have a similar subject matter with respect to joint rates between points in New England and points in other parts of the United States, the primary division being at the Hudson River gateways (or, in the case of the New York Central which extends east of the Hudson River through its lease of the Boston & Albany, at the Boston & Albany junctions with the other New England lines).

It is claimed that between a single block in New England, such as the Boston block, and the block including St. Louis, there may be a thousand different possible routes, and, of course, each of these would present numerous different subdivisions of the through rate. If, as a matter of law, each of these subdivisions must be considered, this provision of the act falls because of its unworkability. If, as a matter of law, this is not the case, then there must be a wide discretion in the Commission as to how to deal with the real problem before it.

There is nothing in the language of section 15 (6) to provide that the division of rates east and west of Chicago on transcontinental business, or the divisions of rates north and south of the Ohio River on traffic crossing that river, or the divisions east and west of the Hudson River on traffic between New England and the rest of the country, can not be dealt with

except when all the subdivisions thereof are likewise contemporaneously and specifically dealt with.

Section 15a of the transportation act recognizes the practical necessity for dealing broadly with the rate problem according to territorial divisions of the country. Pursuant to this idea the Commission divided the country into the eastern, western, and southeastern groups. In 1920 it made different percentage increases in rates in each of these groups. Further than that it made an increase on through rates from one group to another differing from the increase made in either group. For example, the Commission granted a 40 per cent increase in rates in the eastern group, a 35 per cent (and in part 25 per cent) increase in the western group and a 25 per cent increase in the southeastern group. It provided for a 33 per cent increase in joint rates from any group to another.

It can not be possible that the Commission is so limited in dealing with divisions of through rates between one group and another that it can not deal with those divisions with the same breadth of action with which it deals with the rates. Can it be that the Commission, while having the broad power to make an increase of 33 per cent in the joint rates from the Pacific coast in the western group to the Atlantic seaboard in the eastern group, is without power to specify how much of those joint rates shall accrue to the carriers in the western group and how much to the carriers in the eastern group, unless it postpones its action until it shall have scrutinized

the thousands of subdivisions of the primary divisions east and west, respectively, of the Chicago-Mississippi River line?

New England constitutes, in a transportation sense, a district clearly separable from other districts by a variety of controlling conditions. The Commission would have had undoubted power under the transportation act to make New England a separate group, but the competitive conditions between places in New England and other places along the Atlantic seaboard made it inexpedient to adopt this course. Nevertheless the Commission has just as much power to deal broadly with the question of primary divisions at the Hudson River on through traffic between New England points and the rest of the country as if it had put New England in a separate group.

The fundamental reason why there has been and is the practice on the part of carriers, as well as on the part of the Commission, to deal with divisions of through rates from one well-defined district of the country to another on the basis of the primary divisions at the gateways between the two districts is that it is the only practical way to deal with the situation, in view of the vast number of different routes.

In this case it appears that more than half of the entire traffic (other than coal which is not involved in this case), moving between New England and other parts of the United States, moves over two great systems, the New York Central system and

the Pennsylvania system. It also appears that 88 per cent of all this interchange traffic is destined to or from points in trunk-line and C. F. A. territories. The map attached as an appendix to this brief shows how completely, for all practical purposes, the entire situation in this territory is dominated by the railroads which reach the Hudson River. No amount of scrutiny of subdivision which might go to connecting links in any other routes that may be formed on traffic between points in New England and points in this territory east of the Mississippi and north of the Ohio could affect the broad decision as to what is a just and equitable primary division of these through rates at the Hudson River gateways. It is clear from this record, and from the Commission's published reports that the carriers themselves would deal with these matters on the broad and practical basis, and that there is no other way in which the Commission could deal with them so as to make the statute a really effective instrument for regulation of commerce among the States in so far as that is concerned in enforcing reasonable divisions of joint rates. But if this were a debatable question of fact it would be within the Commission's discretion to decide, with such a record as was before it, upon the just and practicable procedure.

The legislative history of section 15 (6) shows that one of the purposes in view was to insure and facilitate the giving of fairer treatment to short line railroads in the matter of divisions with their trunk line connections. In every such case the

practical question which will arise will be how the joint rates ought to be divided between the particular short line on the one hand and the other railroads participating in the traffic on the other hand. If a short line connects, for example, with the Pennsylvania Railroad and the Baltimore & Ohio Railroad, the amount of the through rate not accruing to the short line will accrue in large part to the Pennsylvania Railroad and the Baltimore & Ohio Railroad, but in addition will accrue in part, probably small, to the great variety of connections of the Pennsylvania and the Baltimore & Ohio, with which the two trunk lines may interchange a portion of the traffic. The question how the Pennsylvania and the Baltimore & Ohio divide up with all these numerous connections will of course not be a matter of primary interest to the short line railroad, and the basis of such subdivision between the Pennsylvania and the Baltimore & Ohio and their connections may be reasonably satisfactory to all parties concerned. But the construction of section 15 (6) insisted upon by appellants will mean that the Commission's hands are tied so that it can not deal with the practical question before it as to the division between the short line, on the one hand, and its immediate and remote connections on the other hand, unless and until the Commission separately scrutinizes all the subdivisions among all the links in the numerous routes over which the traffic may move beyond the lines of the Pennsylvania and the Baltimore & Ohio, although nobody may be com-

plaining about the existing basis of making those subdivisions.

In *Pittsburgh & W. Va. Ry. Co.* v. *P. & L. E. Ry. Co.*, 61 I. C. C. 272, the Commission established as between complainants and defendants divisions of rates on coal originating on complainant's line and moving to destinations on numerous different defendant railroads. The Commission prescribed the amount to accrue to complainant and left it to the defendants to divide the rest, or, if unable to do so, to apply to the Commission.

A similar course was pursued in *East Jersey R. R. & T. Co.* v. *C. R. R. Co. of N. J.*, 63 I. C. C. 80.

Nearly every division case that may come before the Commission, either on its own initiative or upon complaint, will be either (1) a case involving primary divisions at one or more gateways between two separate traffic sections of the country, or (2) between a particular railroad company and the various railroads with which it interchanges traffic. In either case the Commission has the power under the statute to deal with the question before it and is not compelled, as a necessary step in order to give it jurisdiction, to deal with the infinity of subdivisions which are not before it and of which nobody is complaining.

The legislative history shows that section 15 (6), dealing with divisions of joint rates, was amended for the purpose of giving greater protection to lines receiving divisions which might be regarded as unrea-

sonably low. But if the provision adopted be so construed that divisions of through rates can not be dealt with until every subdivision of the primary division shall be scrutinized, then the administration of the problem of just divisions has been paralyzed rather than promoted.

2. The Commission Has Properly Preserved Existing Relationships Until Changes Shall Be Sought.

The Commission has not undertaken by its order herein to disturb the existing relationships of the subdivisions of the divisions accruing west of the Hudson River, and naturally it has not done this, since the problem it was considering was the primary division at the Hudson River. The Commission has left the subdivisions west of the Hudson River to remain on the same relative basis as at present, or to be changed according to agreement among the interested carriers, or, in the event of disagreement, has left the door open for application to the Commission. If such application shall be made, it will then be necessary for the first time for the Commission to consider the specific subdivisions which are thus presented for its attention, and in advance of such presentation it would serve no useful purpose whatever to enter upon a scrutiny of all these subdivisions, a matter which the proceeding did not involve, and a matter which is not likely to arise at all unless in exceptional instances.

There can be no basis for characterizing the Commission's order as arbitrary because it did not pre-

scribe all the subdivisions of the through rates west of the Hudson River.

IV. THE COMMISSION HAS THE DISCRETION TO FIX DIVISIONS IN A COMPREHENSIVE MANNER AND WITHOUT DEALING WITH EACH CARRIER INDEPENDENTLY OF ALL THE REST.

Appellants contend that the order is arbitrary and void because it does not separately dispose of the question of the reasonableness of the divisions of each through rate on consideration of the situations of the participating carriers therein and on consideration of those carriers alone; and that the failure to deal with the matter on this basis denied to the individual carriers the rights that were assured to them by the statute.

Appellants insist that the Commission must consider only the particular parties to a particular joint rate, and say "the very essence of the Divisions Statute is that the situations of the different participating carriers be considered, and those alone."

The logic of their argument drives appellants still further to the position that since the conditions of each carrier differ in some respects from the conditions of every other carrier, it must result that in general divisions must be different by each of several through routes, and that, as a matter of law, it is not practicable for the Commission to grant corresponding relief to participants in different through routes. They point out that obvious dissimilarity must exist between the conditions of the various complainants and also between the conditions of the various de-

fendants; that in the matter, for example, of net income, ton-mile density, and length of haul there is wide disparity among the carriers. They say that a carrier in one group or the other may be so situated as to be entitled to the favorable operation of many of the factors of the Divisions Statute, and yet under a blanket group order, such as the one in question, its rights are "submerged under averages."

Appellants' objection to the use of averages in arriving at conclusions as to the reasonableness of divisions is an illustration of the extremes to which their arguments carry them. From the outset of the Commission's work it has found averages of various operating and traffic factors of the highest utility in passing upon the reasonableness of compensation for transportation services. If appellants' position could be maintained it would follow that in the single matter of passing upon the reasonableness of divisions, that is, the compensation which any carrier receives on any traffic carried on a joint rate, no average figures involving any other carrier or number of carriers, no matter how typical or how indicative of what is reasonable compensation, can be employed.

Appellants seek to establish a positive statutory rule to differentiate divisions completely from rates by declaring that—

> The rate between two points is ordinarily the same over competing routes, but divisions are entirely different. They are determined primarily by the comparative services ren-

> dered. So when Congress came to the matter of divisions, * * * it provided with the utmost care for the recognition of individual rights and equities.

We shall show below that these statements are erroneous, and that on the contrary the record clearly shows that divisions via competing routes are frequently the same, and almost invariably related, on account of competition, and in this way bear a close analogy to the total rates themselves.

It must also be remembered that rates are sometimes lower by "differential routes" than by other routes between the same points. Furthermore, the Commission, in ascertaining the reasonableness of rates, has not been confined in its studies to the same rates via different routes, but has always had a broader outlook and has considered, on the basis of comparisons, averages, and otherwise, different rates to different points, as bearing upon the question of what was reasonable compensation.

The question of reasonable compensation, either as to rates as a whole, or as to the divisions thereof, is far too intricate to admit of such categorical statutory distinctions as appellants assume. Congress has not committed itself to the simple but utterly erroneous conception that in determining reasonableness of rates the Commission shall have the discretion to consider different carriers and their operations, on the theory that rates are the same via all routes, but that in determining the reasonableness of divisions the Commission shall have no such dis-

cretion on the theory divisions are entirely different via different routes.

To consider satisfactorily the question of statutory construction thus presented it is well to recall briefly the case with which the Commission was dealing.

There had been a disproportionate increase in operating burdens in New England as compared with the territory west of the Hudson, due to the effect of the war period and postwar period upon striking local characteristics of railroad transportation in New England. The divisions east and west of the Hudson River which theretofore had been presumably reasonable in general had thereby become unreasonable.

The carriers east of the Mississippi and north of the Ohio and Potomac, including the carriers in New England, had received an increase of 37 per cent in freight rates, whereas if competitive conditions had admitted of New England being made a separate rate group, the carriers west of the Hudson would have received a less increase and the carriers in New England would have received a greater increase. As pointed out hereinbefore, without taking into consideration the increased costs resulting from the wage increase in 1920, the New England carriers needed a 47 per cent increase in their freight revenues at the time *Ex Parte 74* was being considered by the Commission, whereas the carriers in trunk line and C. F. A. territories needed an increase of only 28 per cent.

There was an extraordinarily large number of joint rates applying between points in New England and points in the other parts of the country and there was a vast number of different through routes over which the through traffic could be carried, some of these routes being reasonably direct and others being much more circuitous and involving a much larger number of different connecting links. The traffic involved was intensely competitive. The joint rates between the competitive points were the same by all the all-rail routes involved. The divisions east and west of the Hudson were not independent and unrelated as between the different through routes, but on the contrary had been largely influenced by competition of one through route with another.

The Commission had before it, as to the overwhelming preponderance of traffic involved, an individual showing as to the conditions of each Class One carrier, and also had before it extensive compilations showing totals or averages for the carriers east of the Hudson and for the carriers west of the Hudson.

The Commission was charged with the duty of determining whether the divisions were unjust, unreasonable, and inequitable.

The statutory construction proposed by appellants is this: That the Act to Regulate Commerce denies to the Commission any power to look at such a situation comprehensively, but requires the Commission to examine separately and independently the situation of the participants in each joint rate and to consider the divisions of that joint rate with respect

to those participants alone; and requires the Commission, if it touches the divisions at all, to reconstruct the divisions of each joint rate on the basis of the peculiar situations of the participants in that joint rate, with the certain result that the divisions east and west of the Hudson would have to be made different as to each through route, although the total rate to be divided would be the same and although the divisions in the past might have been the same; and with the further certain result that relief would be indefinitely postponed, leaving the carriers west of the Hudson indefinitely in the enjoyment of unreasonable divisions.

What the Commission did, having before it all the factors both special and general, was to reach the conclusion that the changed conditions had brought an element of unreasonableness into these divisions, and that thereby the divisions in New England had become unreasonably low and that such unreasonableness should be corrected by making those divisions 15 per cent higher. This action substantially preserved the preexisting relationship between the divisions via the different routes. Appellants contend that this action was arbitrary and void because the Commission did not confine itself, as to each joint rate, to looking exclusively at the situation of the carriers participating in that joint rate.

1. The Construction of Section 15 (6).

For convenience we will deal separately with the first and third clauses of section 15 (6); the second

clause relates to power to make a retroactive order to the date of filing of complaint and is not now in question.

The first clause of section 15 (6) reads as follows:

> Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers.

We submit the Commission's action in this case is a literal compliance with this provision. The Commission has accorded a full hearing upon the complaint, and has reached the opinion that the divisions of joint rates applicable to the transportation of property are and will be unjust, unreasonable, and inequitable as between the carriers parties thereto and has prescribed the just, reasonable, and equitable divisions thereof to be received by the several carriers.

The Commission has held that the parties thereto east of the Hudson should have their divisions increased and the parties thereto west of the Hudson should have their divisions diminished. This constitutes a determination of the divisions to be received by the "several carriers." If the Boston & Maine

and the New Haven were the only complainants and the New York Central and the Pennsylvania were the only defendants an order uniformly increasing the divisions of the Boston & Maine and the New Haven and uniformly diminishing the divisions of the New York Central and the Pennsylvania would be an order as between the parties to the joint rates and as between the several carriers. The fact that there are many more carriers does not change the effect. We have heretofore shown that there is no necessity for the Commission prescribing all the countless subdivisions east and west of the Hudson.

What appellants ask could only be accomplished by reading into this introductory clause a limiting phrase which is not there, so as to make the clause read, omitting unnecessary matter, about as follows:

> Whenever, after full hearing, the Commission is of opinion that the divisions of joint rates *upon a single through route considered without reference to any other through route,* are unjust as between the carriers parties *to such particular through route,* the Commission shall by order prescribe the reasonable divisions thereof to be received by the several carriers.

We submit that every principle of statutory construction and the entire history of the administration and adjudication of the Act to Regulate Commerce and its amendments are opposed to any such restrictive interpolation.

But appellants also attach great importance to the concluding clause of section 15 (6), which reads as follows:

> In so prescribing and determining the divisions of joint rates, fares, and charges the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge.

In this proceeding the Commission has had before it elaborate evidence bearing upon every element set forth in the language quoted, as well as upon other elements not set forth, and it has reached its conclusion after the consideration of all such evidence.

It is true appellants appear to contend that the Commission gave too much consideration to some of these elements and too little consideration to others. But unless the courts are to take over the difficult task of weighing all these elements and substituting their conclusion for the Commission's conclusion as to the relative weight to be given to these matters (and the courts have repeatedly declared that they will do nothing of the kind), appellants' contentions are unsound.

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A reading of the clause quoted shows that its manifest purpose was to emphasize the proposition that mileage should not be necessarily the controlling factor.

The court below commented upon this feature of the clause in the following language:

> In the past, the joint railroad service was largely measured by the mileage performed by the participating carriers. This was then the way of expressing the relative burden incurred. It became apparent that other things measured the burden besides mileage and it was this increasing appreciation of these factors that led to the provisions of section 15, subdivision 6, indicating that mileage alone was not to be considered. (Record, p. 947.)

Clearly the clause last above quoted was designed to enlarge the scope of the Commission's inquiry. Appellants now endeavor to turn the language used for this purpose into a limitation to narrow the Commission's inquiry and to shut it up, as to the divisions of each joint rate, in such a way that it can not look comprehensively at broad considerations which may have a vital bearing upon what would be reasonable divisions.

The narrow and restricted meaning which appellants demand can not be read into section 15 (6) in the absence of imperative requirements growing out of the principles of statutory construction.

In considering this contention for the strictest imaginable congressional limitation upon the Com-

mission's discretion in determining what are reasonable divisions, it is important to keep in mind certain controlling features of the subject matter.

One of these is the fact of intense competition.

2. Commission Entitled to Consider Whether Competitive Conditions Call for Uniform or Related Treatment of Divisions.

The bearing of competition upon rates has long been appreciated because the Commission has been actively dealing with rates for a long time, but so far there has been little occasion for the courts to give attention to the bearing of competition upon divisions.

It is well known that the through rates from Boston to Chicago are the same via the principal all-rail routes. Appellants' brief assumes that divisions of this rate can be and are constructed for each through route with exclusive regard to the conditions of the carriers participating in that route and without any regard to the divisions obtainable via other routes. But the facts are otherwise.

H. S. Bradley, who testified as the General Representative of the C. F. A. Lines, set forth the factors which were recognized by the carriers in the fixing of divisions, and among other things said:

> Fifth, competitive situations have some influences in the fixing of divisions between roads, and it is not an infrequent practice for the long route to equalize the divisions of a short line, and the strategic position of a road in relation to the control of its traffic is an important consideration when there are a num-

ber of carriers competing for the traffic. (Record, p. 757.)

After various detailed explanations he said:

> I referred to the fact that sometimes, for competitive reasons, long lines were compelled to shrink their distance to compete with the short line. This is an instance of that sort, the Clover Leaf accepting the Wabash distance between St. Louis and Toledo. (Record, p. 760.)

Speaking further of the divisions in C. F. A. Territory, he said:

> On the lines south of the lakes they would adopt substantially the same system of divisions as to the competitive points, where there was a big tonnage. Witness thinks this theory had nothing to do with the size of the groups on the Pennsylvania. There is competition at every one of the cities, Cleveland, Cincinnati, Indianapolis, St. Louis, Chicago, and Grand Rapids, which witness has used as illustrations. (Record, p. 776.)

Witness Bradley is further quoted in the Record as follows:

> Witness does not think that as a practical railroad man he would recognize the cost of service on the participating lines as a controlling principle in the fixing of divisions. It is frequently the case that the strategic position of a line, in throwing business from one competitor to another, might enable it to disregard the comparative cost of service on it and its connections, in fixing divisions. (Record, p. 782.)

It is not surprising therefore that, in view of the active competition in the C. F. A. Territory, Mr. Bradley testified (Record, p. 763):

> As between the individual roads in Central Freight Association territory, they generally fare the same on their divisions with the New England lines.

Witness Robert C. Wright, Chairman of the Trunk Line Committee, explained that the mileage from Boston via the Boston & Maine to Northampton and thence to Harlem River is in excess of the New Haven mileage but in making divisions with the Pennsylvania the Boston & Maine "have taken the same pro-rating mileage in competition with the direct New Haven route." The record continues, "witness thinks that can be called the customary procedure in the matter of fixing divisions." (Record, p. 510.)

Mr. George H. Wood, General Freight Agent of the New Haven, explained the basis of divisions between the Pennsylvania and the New Haven, and then explained that, as to the B. & O., "divisions were predicated on basis of divisions in effect to and from contiguous stations on the Pennsylvania Railroad" (Record, p. 362); explained that as to the Central Railroad of New Jersey, the Reading, and the Lehigh Valley, "the grouping or blocking employed in making divisions was practically the same as with the Pennsylvania Railroad," except with the modification of an arbitrary allowance. (Record, p. 362.) He explained that as to the Delaware, Lackawanna

& Western "the grouping of New Haven stations for divisional purposes was the same as employed in making divisions with the Lehigh Valley Railroad, and also the blocking for the Delaware, Lackawanna & Western Railroad was arranged with relation to the method followed in making divisions with the Lehigh Valley Railroad, Central Railroad of New Jersey, and Erie Railroad." (Record, p. 363.) He explained as to the Delaware & Hudson that "the divisions were made on practically the same basis as with the Delaware, Lackawanna & Western and Erie Railroads."

D. T. Lawrence, General Freight Agent of the Lackawanna, one of the appellants, testified before the Commission that if another older route (the Pennsylvania) was the short route, and the established route, and that his road wanted to share in that business, it would have to give at least as good terms as the Pennsylvania, and would do so. (Record, p. 535.)

A. J. Anderson, Assistant General Freight Agent of the B. & O., explained that the B. & O. divisions with the New England carriers were generally built up based on the Pennsylvania Railroad divisions which were first in existence, and that generally speaking the B. & O. was competitive at most points with the Pennsylvania Railroad, and that it was necessary "to put them in on the same basis as the Pennsylvania Railroad." (Record, p. 545.)

William S. Kallman, Commerce Assistant to Vice President of the New York Central, in accounting for

the existence of certain divisions to points on the Fitchburg (a part of the Boston & Maine), said "it was not a question of what was considered fair at the time. It was a question of what you could get * * *. The Fitchburg had another outlet through Mechanicville and D. & H. What was the use of complaining? It was no use. It would have been futile." (Record, p. 594.)

Henry Adams, General Freight Agent of the Erie Railroad stated that its first divisions with the New Haven became effective in 1896 via Weehawken and Harlem River and that "the divisional arrangements, so far as witness can ascertain, were based largely, if not entirely, upon arrangements that were previously in effect between the New Haven Railroad and the Pennsylvania Railroad." He added that in 1901 the through route was shifted to Newburgh "with little or no change in percentage division on account of the change in route." He added that the route was then shifted in 1904 to Maybrook and the divisions of rates were revised by a reduction in Erie mileage of 30 miles, a reduction in New Haven mileage of 30 miles, and an allowance of 60 miles to the Central New England road which the shift introduced as an intermediate carrier. (Record, p. 540.)

A glance at the map accompanying this brief brings out the extraordinary competition of different through routes between points in New England and all points west and south. This particular map shows only those railroad systems west of the Hudson River which reach the Hudson River (together with the

B. & O. and Reading). The extent of this competition is very much greater than is indicated on the map, because there is a large number of railroads west of the Hudson River which do not reach the Hudson River, and which therefore are not shown on the map, but which through various points of connection with the railroads shown on the map establish a great many additional through routes. It is evident that the competitive influences which were stressed by the witnesses are exceedingly active on both sides of the Hudson River, and that no carrier on either side in negotiating divisions would be in position to ignore the fact of divisions offered by its competitors which could handle the same traffic via other through routes.

As bearing upon practical competitive considerations in favor of viewing these divisions in a comprehensive way, President Pearson of the New Haven explained (Record, p. 478), that it had been the practice to permit connections west of the Hudson to solicit traffic via all gateways and that the New Haven had not interfered with the routing of the traffic via any gateway in accordance with directions resulting from such solicitation, and that "it follows that if this principle is to be maintained the relation of the divisions to each other should not be disturbed, and increases requested should apply via all gateways. If this position is accepted by the Commission, the problem is immediately simplified. It becomes general, not one of a mass of details."

According to appellants' view the Commission would have to reach an independent conclusion,

based on separate and distinct factors as to the divisions on each through route, and thereby would create disparities between the divisions which—by reason of competition—have never existed.

Unless there is to be read into the statute a limitation upon discretion which is not expressed, and which would be at variance with the whole policy of the Act to Regulate Commerce and its amendments, it cannot be contended that, in arriving at a conclusion as to what is just and reasonable, the Commission is, as a matter of law, without discretion to consider in the same proceeding a great number of joint rates which are essentially competitive, or without discretion to decide that reasonableness of divisions will be best promoted by a degree of uniformity in treatment. The Commission would waste its time and greatly impair its ability to arrive at a just conclusion if it disregarded this important element of interrelation between the divisions via various routes, in a situation so highly competitive as that presented by the traffic between New England and other parts of the country.

If the statute forbids the Commission to exercise any discretion in looking beyond the divisions of a particular joint rate, in a situation so complicated and interrelated, it results that the statute compels the Commission to ignore factors which the carriers themselves undoubtedly consider in determining what is reasonable. As a further example, George H. Eaton, Assistant Freight Traffic Manager of the Boston & Maine, testified to the effect that the longer

link in one through route should not get a higher division than the corresponding link in another through route between the same points, but that such longer link should "shrink" its compensation so as to equalize the division to the corresponding shorter link in the other through route, since the disability would be with such longer route (Record, p. 397).

3. Commission Entitled to Consider Whether Questions of Efficiency Call for Uniform or Related Treatment of Divisions.

Another phase of interrelation in the matter of divisions to be fixed via different through routes is that the public has a distinct interest in avoiding the undue encouragement of sending traffic via circuitous and inefficient routes. For illustration, assume two through routes from Boston to Chicago, one consisting of a single line between Boston and the Hudson and another single line between the Hudson and Chicago, representing the minimum distance and the greatest operating efficiency because there will be only one terminal interchange between different carriers, that is, at the Hudson. Assume that the other through route consists of the same line in New England between Boston and the Hudson, but between the Hudson and Chicago consists of four different lines, thus involving three additional terminal interchanges between connecting carriers and involving considerable additional mileage.

Appellants' construction of the statute would mean that the Commission must deal with the divi-

sions on each of these two through routes without regard to the divisions on the other; that the Commission in viewing the longer and less efficient route must consider exclusively the situation of the carriers participating in that route, and since obviously the operating burdens of greater mileage and of additional terminal interchanges would be great, the Commission would have to give this more circuitous and costly route a substantially larger division than would be given to the direct and more efficient route for performing the same service. It might be that if the Commission had its discretion thus limited, it would be compelled to award this circuitous route west of the Hudson 75 per cent of the joint rate, while awarding the direct and more efficient route only 60 per cent thereof; in other words, the New England line would get 40 per cent of the joint rate if it delivered the traffic to the efficient route, but would get only 25 per cent if it delivered the traffic to the inefficient route, and since the routing is in the hands of the shipper at his option, the traffic might go via the inefficient route to a large extent. The service via the more circuitous route is of no more value to the public or to the New England line. Is the latter to be penalized in those cases where traffic goes via the circuitous route? May it not well be of the highest importance for the Commission, in arriving at the reasonableness of the divisions, to have the discretion to take into consideration the average conditions of the two routes and arrive at a fair average conclusion, rather than to be compelled by an

extreme and unwarranted construction of the statute to fix a much higher division for the more inefficient line? It can not be that the statute denies to the Commission the right to consider this important element of public interest in arriving at what is a reasonable division, and yet such an absurd result necessarily follows from appellants' construction of the statute.

The Commission by its uniform method of treatment avoided the unreasonable result (which probably would have resulted from dealing separately with each through route as urged by appellants) of giving to the circuitous or less efficient routes west of the Hudson substantially greater divisions than would be enjoyed by the direct and hence more efficient routes, and this in spite of the fact that to a large extent the divisions via different routes have undoubtedly approximated uniformity on account of competitive conditions. Congress could not have intended to deny the Commission any discretion on such an important factor.

In determining what is reasonable compensation to a carrier for a given service, the question as to the compensation which other carriers charge for the same service, and the question of the inherent value of the service in view of what other carriers are entitled to demand therefor, are obviously factors for the consideration of the Commission. Certainly section 15 (6) has not prohibited the Commission from considering these factors. Yet they would be excluded from the Commission's consideration according to appellants' construction of section 15 (6).

4. Numerous Possibilities of Interrelation Between Divisions on Different Through Routes. Congress Has Not Prejudged Situation by Declaring There Are no Interrelations.

Appellants, in describing the situation of the innumerable through routes between New England points and points west of the Hudson, say:

> These routes from different sections of New England to different parts of the country criss crossed in every conceivable way and were largely unrelated.

The very fact that these routes "criss crossed in every conceivable way" constituted an ample basis for the Commission deciding, in the exercise of its discretion, that they were largely related, rather than unrelated, and hence that in order to arrive at reasonable divisions, the best course was not to try to deal separately and differently with the divisions of each joint rate, but to view the situation comprehensively and thereby also avoid unduly disturbing the relations between the different joint routes. Appellants draw the wrong inference from the facts when they say that these routes criss crossing each other in every conceivable way were largely unrelated, and they misconstrue the statute when they say that it prohibits the Commission from drawing its own inference from that fact of paramount importance.

It is noteworthy that while appellants at one place erroneously assert that these through routes are largely unrelated, they assert at another place a very

great degree of interrelation. When appellants seek to make the point that there is a lack of evidence as to certain through routes (a point which we will meet in this brief), they insist that on this account the entire order should fall because they say (speaking of these carriers as to which they say evidence is lacking): "The traffic movements in which they engage are so related and interrelated with the traffic movements of other carriers affected by the order, that it can not be considered as separable . . ."

We have suggested certain obvious phases of interrelations between the divisions of different through routes. These phases are clearly presented in this record. Undoubtedly they deserved consideration by the Commission. But they could not have been considered if the narrow and exceptional philosophy proposed by appellants were applied to the Commission's power over divisions. Doubtless there are other important elements of interrelations between divisions via different routes and these will come to light from time to time in future cases. But none of them could be considered if the statute should be construed in the narrow way proposed by appellants. It can not be that Congress intended to declare that as a matter of law there could be no such thing as an interrelation between divisions of different through routes.

5. Comprehensive Consideration of Divisions in Connection With a General Rate Increase or Decrease.

A powerful reason for comprehensive treatment by the Commission arises in connection with a case

which is related to a general increase or decrease in rates.

Even before the Transportation Act the Commission had adopted the practice of making general increases and general decreases in rates, and this practice has been strikingly confirmed by the Transportation Act. Section 15 (a) contemplates that the Commission shall make general increases or general reductions in rates in a prompt and effective manner when the public interest requires. It may frequently be true that such prompt blanket increase or blanket decrease in rates may necessitate a readjustment of divisions of joint rates, especially at principal dividing lines like the Hudson or the Ohio or the Mississippi, as otherwise divisions formerly reasonable might become unreasonable.

If appellants' position be correct that the Commission has no power to deal with divisions except separately and independently as to each through route and except as it fixes every subdivision, the result may be at times to defeat the due exercise of the broad powers which the Commission is supposed to possess to see that both rates and divisions are reasonable in the public interest.

No better illustration of this condition could be afforded than appears in this case.

When in 1920, immediately after the passage of the Transportation Act, the Commission was confronted with the grave responsibility of making a heavy increase in rates on account of the great increase in operating burdens during and since the

war, it found that this increase had been proportionately greater in New England than anywhere else. Theoretically this would have justified a greater percentage increase in rates in New England than anywhere else. In fact, even before taking into consideration the Labor Board's heavy increase in wages, there would have been justified an increase of 47 per cent as to rates in New England, as compared with an increase of 28 per cent which would have been called for in Trunk Line and C. F. A. territories. But the Commission was also confronted with the situation that commercial factors were such that a substantially greater increase in New England than in Trunk Line and C. F. A. territories would prove exceedingly prejudicial to New England commerce and industry for competitive reasons. Therefore in the exercise of its discretion the Commission decided upon grouping the New England States with the other States referred to and thus gave the New England Lines less than they were entitled to and the Trunk Lines and C. F. A. Lines more than they were entitled to.

It would seem that such conditions might operate to make the divisions of through rates at the Hudson unreasonable, though formerly reasonable, and that in such a case the Commission's power should be equal to the situation.

The Commission however instead of dealing with the divisions at the Hudson at the same time of the general increase, merely called upon the carriers

to consider readjusting the divisions of the New England lines, saying:

> While the New England carriers are included in the eastern group and are subject to the percentage for that group, the evidence as to the disproportionate needs of the New England lines makes it desirable that the carriers give careful consideration to the divisions of joint rates accruing to these lines.

It developed later that the carriers were unable to agree or to move promptly towards an agreement and then the Commission did in the present case what it might have done at the outset, to wit, ordered an increase in the divisions of the New England lines so as to avoid at least in part the new element of unreasonableness which had come into the division of the joint rates on account of the disproportionate increase in operating burdens upon the New England lines.

The position of appellants is that the Commission has no power to do this; that the Commission is strictly limited in its choice of means to advance rates so as to make them and their divisions reasonable; that the only way in which it could act comprehensively in behalf of the New England lines was to make a separate New England group, and that if this could not be done, the only remaining comprehensive power the Commission had was to make a blanket increase for eastern territory as a whole, even though this gave New England lines

less and appellants more than was relatively just, and even though this operated to make preexisting divisions unreasonable. Of course it would result that the appellants would be entitled to enjoy the full measure of the disproportionate benefit thus arising until the expiration of the period, no matter how long, that might be required for separate independent action upon the divisions and all the subdivisions of each through route between New England and other parts of the country. Such independent action would require a separate investigation of the conditions of all the connecting carriers participating in each of these through routes, and that such divisions or subdivisions be proportioned to the amount of service which each of such carriers might render in respect of each of such through routes.

Appellants claim, however, that an increase in rates in the Eastern group and a disproportionate increase in operating burdens in New England would be two entirely distinct things and could not possibly operate one upon the other. This, however, is not necessarily true. If we assume a disproportionate increase of operating burdens in New England this would properly call for a readjustment in divisions. But if we assume also an increase in rates both local and through which would operate to give the carriers west of the Hudson more than their increased operating burden would call for, and would give the New England carriers less than their increased operating burden would call for, this might or might not intensify the need for a readjustment of the divisions of the

joint rates and might also require giving a still greater proportion of the total through rates to the New England lines. These are not matters about which legal pronouncements can be made. They are matters of fact about which different inferences may be drawn. The Commission is the tribunal which has the right to draw the inferences and it of course should have the right to consider the matter with sufficient comprehensiveness to take the inferences into consideration.

It is highly important to consider that the evolution of the Commission's power, especially as now established by the Transportation Act, has produced a situation where the Commission to a greater and greater extent must deal, and in fact has had to deal, with rates in the most comprehensive way on several thousand different articles of commerce for hundreds of thousands and perhaps millions of different hauls without regard to any separate weighing of the relative reasonableness of the rates. In 1920 the carriers applied to the Commission for heavy rate increases nation-wide in their scope. While these applications were pending the Labor Board created by the Transportation Act approved increases in wages of over $600,000,000. At once the carriers applied for still further increases to cover this tremendous additional operating cost. The Commission had to deal promptly and effectively with this broad problem, as was clearly contemplated by the Transportation Act. Similar cases may arise in the future. There have been various wage reductions.

There may be others, and there may be wage increases. The whole railroad network of the country is so closely interrelated that there may be other sweeping and sudden developments in operating costs either up or down. The Commission must deal with these in a comprehensive way. Moreover, such developments of operating cost may be sectional instead of nation-wide. Even apparently uniform action throughout the country by the Labor Board with respect to wages may turn out to have widely different effects in practice in different sections of the country. This in fact is what happened in this case, as was held by the Commission, due to the peculiar conditions in New England resulting in a disproportionately increased unit cost of labor, although the percentages of increased wages were uniform throughout the country. It is also conceivable that the Labor Board might approve a special increase or a special decrease in wages in New England on account of conditions peculiar to that section and as a result prompt and sweeping readjustment might become desirable not only of the local rates in New England but of the through rates into and out of New England. When we consider the breadth of the Commission's powers, in general, and the needs that have arisen and may arise for comprehensive action as to the compensation to be received by carriers, it would be absurd so to limit its powers in dealing with divisions of through rates as to deprive it absolutely of any practical resort in such matters to that method, among others, of accomplishing justice between

carriers in accordance with the standards of reasonableness prescribed in the law.

As a result of the indescribable complexity of the railroad traffic situation confided to the Commission's jurisdiction, there are in practice two well-defined lines of procedure by it as to rates. One is the daily, year in and year out, unceasing readjustment of specific rates, so as to remove specific instances of injustice. The other is the broad dealing with rates in general for the country as a whole for all traffic, or for specific traffic, or for some particular section as to all traffic or specific traffic, in the light of general conditions which call for modification of rates to prevent injustice and to promote the broad purposes of the law and with special reference to the bearing which just compensation might have upon the proper maintenance of the transportation service. But as to divisions, the position of appellants is that the statute must be given such a restrictive interpretation as to confine the Commission's functions exclusively to the first mentioned sort of procedure—that is, to dealing with each division and subdivision of a specific through route—and that the court must read into the law a purpose to exclude from the Commission's powers as to divisions any power whatever to deal with them comprehensively. It would follow that the Commission, while engaged year after year in the task of meticulous examination and modification of the divisions on specific through routes (and we are not mathematicians enough to compute the myriads of through routes in the country), it would never

be able to deal with such a situation as was presented here in this case, although comprehensive dealing might be the only way to correct injustice and promote the policy of the law.

6. No Difference in Principle Between Regulation of Rates and Regulation of Divisions Would Justify Appellants' Position.

Appellants seem to think that there is some inherent difference in principle between what can be done by Congress in the regulation of the total rate and in the regulation of the divisions of that rate, but there is no such difference. Both matters are now dealt with to protect and promote the public interest. So long as congressional regulation was confined to seeing that the total rate collected from the shipper was not unreasonably high, the question of the division of that rate was relatively unimportant to the public. But since Congress by the Transportation Act, as pointed out by this Court in *R. R. Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, has entered upon the policy of seeing also that an adequate railway service is maintained for the people of the United States, the question of divisions has assumed a public importance which it did not possess before. Even though the carriers may agree on such divisions, the new provision as to divisions indicates that the Commission is not bound by that agreement, but may take the initiative in correcting the unreasonableness to the end that the public interest may be promoted.

Since the public is interested in seeing that an adequate railroad service is maintained, and therefore in seeing that divisions are just and reasonable even in cases where the carriers have agreed upon an improper apportionment of the rate, the division becomes just as much a matter of public concern as is the rate itself. It is not an individual matter to a carrier operating between Chicago and New York as to the rate it shall charge because the public has an interest in that subject. And now it has ceased to be an individual matter as to how much that carrier shall charge in hauling traffic from Chicago to New York when the traffic is destined to Boston. There can be no difference whatever in the quality of the power of Congress in the public interest to control the divisions and to control the total rate.

From the time the rate-making power was conferred upon the Commission its power has been construed broadly and not narrowly, to the end that the remedial purpose of the law should be promoted. Exactly the same situation now arises as to the provision concerning divisions.

7. The Broad Administration of Rate Regulatory Provisions Ever Since 1906 Illustrates the Necessary Public Policy in These Matters.

It will be profitable to review, therefore, the policy which has been manifested since the rate-making power was conferred on the Commission by the Hepburn Act in 1906. It will appear that from the very beginning of the exercise of that power it has

been applied in the broadest possible way and has not been confined to dealing merely with the reasonableness of a rate in the light of the circumstances peculiar to a particular carrier.

Appellants fall into the error of assuming that a general treatment of rates by the Commission, as distinguished from a separate treatment for each individual carrier, rests upon section 15a, which was incorporated in the law by the Transportation Act.

The Commission's dealing with rates for carriers as a group or in the aggregate antedated the Transportation Act, and was habitually exercised under a statute which by its terms dealt merely with the individual rights of a shipper and a carrier. There was a steady development, growing out of the nature of the subject matter, along the lines of handling broadly these traffic problems so essentially interrelated from every standpoint.

The Hepburn Act of 1906 contained in section 1 the provision:

> All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 15 of the Act to Regulate Commerce, as amended by the Hepburn Act, conferred upon the Commission the power whenever after full hearing upon complaint "it shall be of the opinion that any

of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this Act, for the transportation of persons or property as defined in the first section of this Act * * * are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, * * * to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged."

This language authorizing the Commission to pass upon the reasonableness of any of the rates collected by any common carrier or carriers not only did not expressly authorize the Commission to deal with carriers in groups, but was no broader than the language of section 15 (6) which authorizes the Commission to consider the reasonableness of the divisions of "joint rates." There was necessarily implied in the language above quoted from the Hepburn Act the idea that the Commission was to pass upon the reasonableness of the rates as between the carriers and the shippers of the traffic. It might have been argued, just as appellants argue here, that there should be read into the clause the hampering limitation that the rates of each carrier must be looked at separately as between that carrier and those shipping over its line. But under the language of the Hepburn Act the Commission has dealt broadly with the reasonableness of rates as between all carriers performing the service on the

one hand and all shippers of the traffic on the other hand, instead of applying its authority in a disjunctive sense so as to consider the question of reasonableness between a particular carrier and its shippers and no others.

In 1908, in *Burnham Hanna, Munger Co.* v. *C. R. I. & P. Railway Co.*, 14 I. C. C. 299, the Commission entertained a single complaint against all the railways, five in number, between the Mississippi and Missouri Rivers, to the effect that all the through rates from the Atlantic Seaboard to Missouri River cities on all the commodities in the five numbered classes were unjust and unreasonable because the part of the through rate accruing between the Mississippi and Missouri Rivers (which was the same as the local rate), was too high. The Commission, with apparently no separate consideration of operating or other conditions applicable to any one of these carriers in particular, and upon general considerations, reached the conclusion (p. 313), that the complaint was well founded and hence that the separately established rates of the defendants applying between the Mississippi River crossings and the Missouri River cities to the through transportation of shipments moving under class rates and coming from the Atlantic Seaboard taking New York as representative, should be uniformly reduced by a substantial amount.

This was a case of the blanket fixing of the proportion received by these five railway companies out of the through rates, and the consequent reduction of

such through rates accordingly, simply on the basis of the authority contained in the Hepburn Act.

The Commission's order in this case was upheld by this Court, in *Interstate Comm. Com.* v. *Chi., R. I. & Pac. Ry.*, 218 U. S. 88 (1910). The Court said:

> The outlook of the Commission and its powers must be greater than the interest of the railroads or of that which may affect those interests. It must be as comprehensive as the interest of the whole country. If the problems which are presented to it therefore are complex and difficult, the means of solving them are as great and adequate as can be provided (p. 103).

The court also said:

> The Commission is the tribunal that is intrusted with the execution of the interstate commerce laws, and has been given very comprehensive powers in the investigation of and determination of the proportion which the rates charged shall bear to the service rendered * * * (p. 108).

The Court further said:

> Such decision * * * is peculiarly the province of the Commission to make, and that its findings are fortified by presumptions of truth "due to the judgment of a tribunal appointed by law and informed by experience" (p. 110).

Thus in 1910, when the essential interrelation of carriers was far less appreciated than at the present time, the Commission made and this court upheld a

sweeping order dealing in a blanket way not only with through rates, although there was no express statutory authority for group or blanket treatment, but actually dealing with the proportions or divisions themselves which an important group of carriers was entitled to receive, thus substantially changing the relative participation in through rates which had theretofore been enjoyed.

In the *City of Spokane* v. *N. P. Ry. Co.*, 15 I. C. C. 376, the Commission said:

> The city of Spokane could not develop if served by the Great Northern Railway alone; nor can we look wholly to the interest of Spokane. The whole territory served by these defendant lines must be considered and the existence of all these railroads to that territory is absolutely essential. These railroads can not exist unless rates are established which will yield a fair return upon their property. We must, therefore, in fixing these rates, have regard not altogether to any one particular railroad, but to the whole situation, and must consider the effect of whatever order we make upon all these defendants.

In *Advances in Rates—Eastern Case*, 20 I. C. C. 243, 274, 275 (February 22, 1911), the Commission was considering an advance in rates in Official Classification Territory and decided to test the reasonableness of the rates by considering the conditions on the Pennsylvania, the New York

Central, and the Baltimore & Ohio systems and said:

> The freight revenues of these three systems would be nearly one-half of the total revenues of all railroads in the territory in question, and they transport this traffic by their own rails between all important places. In 9 I. C. C. Rep. 382, this Commission considered the justice of certain advances in grain rates between Chicago and the Atlantic seaboard and it there held that whatever rate might reasonably be imposed upon these three systems must be held to be a reasonable charge for that service by all lines. We hold to the same view in this investigation. We do not mean that other lines should not be considered, but that these systems may be taken as typical. Under rates reasonable for these three systems there may be lines whose earnings will be extravagant, but that is their good fortune. There may be lines which can not make sufficient earnings, but that is their misfortune. We ought not to impose upon this territory, for the purpose of allowing these defendants additional revenues, higher rates than are adequate to these three systems considered as a whole.

In *Advances in Rates—Western Case* (February 22, 1911), 20 I. C. C. 307, 324, the Commission considered a general advance in rates in the West. It said (p. 324):

> While many carriers are named as defendants herein, they are in the greater part ex-

tremely small local lines. The territory is served by a few large systems, which we will deal with as typical, though some are much stronger than others.

In *Railroad Commission of Texas* v. *A., T. & S. F. Ry. Co.* (Feb. 22, 1911), 20 I. C. C. 463, the Commission considered and upheld as reasonable extensive rate increases throughout the Southwest, thus deciding in a blanket way, in favor of carriers generally and as against all shippers and all classes of traffic, upon the reasonableness of such rates. Indeed, the Commission expressly indicated (p. 468) that it would not undertake to look into the reasonableness of individual rates.

In *The Five Per Cent case* (July 29, 1914), 31 I. C. C. 351, the Commission considered general rate increases in class and commodity rates in Official Classification Territory. It viewed the matter primarily from the standpoint of the question whether the present rates yielded adequate revenues to the carriers. As a matter of course and without comment, it dealt with the matter primarily from the standpoint of the average results for 35 railway systems in Official Classification Territory, although showing the results for the individual carriers as well.

It then looked at the matter from the standpoints of a group of 10 systems, of the three leading systems (Baltimore & Ohio, New York Central, and Pennsylvania), of the New England lines, and of the 17 remaining lines. It upheld a blanket increase in rates in C. F. A. territory.

In a dissenting opinion by Commissioner Daniels he showed on pages 448 to 450 that the Commission necessarily had to view rates as a whole and that "to construe the law to the contrary would nullify it and reduce the commission to a state of administrative paralysis." He referred particularly to the course adopted by shippers in attacking tariffs as a whole without attempting to show each particular rate is unjust, and cited the *Express Rate case*, 24 I. C. C. 380, *Arlington Heights Fruit Exchange* v. *S. P. Co.*, 19 I. C. C. 148, fixing a uniform blanket rate of $1 on lemons from California to the Atlantic, thus fixing rates for thousands of different hauls of varying length (indicating that this was eventually sustained by the Supreme Court, 231 U. S. 736), *City of Spokane* v. *N. P. Ry. Co.*, 21 I. C. C. 400 (sustained by the Supreme Court in 234 U. S. 476), and *Railroad Commission of Texas* v. *A. T. & S. F. Ry. Co., the Southwestern Rate case*, 20 I. C. C. 463.

This portion of his opinion contained a footnote saying:

> It ought to be said, however, that what is above stated as to the burden of proof and the authority of the Commission to pass upon rates as a whole does not imply that these views are opposed to those of the majority.

In *The Fifteen Per Cent case* (June 27, 1917), 45 I. C. C. 303, the Commission considered a proposition to increase rates throughout the country.

The Commission said (p. 310):

> Many of the protestants requested us to suspend these tariffs in order that an investigation might be had, as in their view is contemplated by the statute, the implication being that an investigation would be impossible without suspension. This view is erroneous. We have sat as a body for practically a whole month listening to testimony and arguments favoring or opposing these proposed increased rates. More than 6,000 pages of testimony have been received and a mass of statistical and other exhibits has been made a part of this record.
>
> The form of the investigation which we adopted fitted the subject to be investigated. Had these proceedings been conducted subsequent to a suspension of tariffs they could not properly have been materially different from what they have been. Everyone who appeared and expressed a desire to be heard was heard and no one was denied a fair hearing. We might have sat for months listening to detailed testimony relating to specific rates and localities, but such testimony could have been of little assistance to us in arriving at a proper conclusion with reference to the propriety and reasonableness of the increased rates here proposed covering the entire country. An investigation of such a detailed character is neither necessary nor useful in the exercise of the functions which we are called upon to perform in a case of this character.

The Commission, as a matter of course, dealt with the results of the carriers as a whole, first for Class I

railroads for the entire country, and second for Class I railroads in each of the three districts (see tables following the report and beginning on p. 342).

The Commission on the basis of this hearing authorized an increase of class rates in the eastern territory. The Commission said (p. 323):

> As has been indicated, however, the conditions confronting the eastern carriers are substantially different from those confronting the southern and western carriers, and we are persuaded that they are entitled to increased revenue beyond and above that which they are securing and will secure from the increased rates on bituminous coal, coke, and iron ore.

It results from the foregoing that prior to the transportation act, 1920, the Commission, in prescribing rates, habitually dealt with carriers as groups and with rates as groups, although the act to regulate commerce required only that each rate should be reasonable, and directed no grouping whatever of carriers. This increasingly extending practice of the Commission represented a highly important practical construction based on the growing appreciation of the interdependence of the whole transportation situation.

The Transportation Act, making a new departure, has sought to provide for the maintenance of an adequate railroad service, and in promotion of that new purpose the Act enlarged the Commission's power and duty as to divisions. Therefore the same support should be given to comprehensive action in

that regard, when necessary in the Commission's opinion, as has been given for sixteen years to comprehensive action as to rates under statutory provisions no broader in natural effect.

8. Legislative History and Purpose Concerning Section 15 (6). Congress was not Moving in the Opposite Direction From the General Policy of the Transportation Act.

Appellants are forced to recognize that in general the Transportation Act represented both a strengthening and a broadening of the powers of the Commission, and the logic of their position forces them to acknowledge that their construction of section 15 (6) puts it out of harmony with the provisions of the Act relating to rates. Appellants point out that section 15a requires the Commission to consider carriers as a "group" "in the aggregate" and yet insist that section 15 (6) looks only at the situation of the individual carrier and therefore is the "direct antithesis" of section 15a. Appellants urge that Congress "deliberately dealt with the two subjects in the opposite manner," because as to rates the matter might reasonably be determined from the standpoint of the interest of the carriers as a whole, but in the matter of divisions the rights were "individual," and hence Congress "intended that the two subjects should be dealt with in different ways."

The great outstanding fact of the recent history of Federal railroad legislation is the new policy adopted by the Transportation Act of 1920, to pro-

vide an affirmative form of regulation which would promote the maintenance of an adequate railway service.

In *R. R. Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, called the *Wisconsin case*, this Court said:

> It is manifest from this very condensed recital that the act made a new departure. Theretofore the control which Congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered and the abolition of rebates. The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in section 15(a) to be one of the purposes of the bill.

Indeed the Transportation Act of 1920 is permeated with this new principle of an affirmative policy to enable the railroads to serve the public. The public loans to be made to carriers during the transition period following Federal control, the jurisdiction of the Labor Board, the Commission's emergency power to turn over to one carrier the locomotives and cars

of another and to divert traffic from one carrier to another, the control of future railroad construction, the power to require the provision of safe and adequate facilities, the power to give one carrier the use of terminal facilities of another, the power to authorize one carrier to acquire control of another, the provisions for a plan of railroad consolidations, the power over intrastate rates, the power to prescribe minimum rates though a carrier may wish in its own interest to establish lower rates, and the exclusive control over the issue of railroad securities all illustrate this new and affirmative policy of promoting the public interest.

Bearing in mind this fundamental development of the Transportation Act which, in the absence of controlling language to the contrary, must be an important factor in construing all its provisions, a brief reference to the legislative history of the various provisions concerning rates and divisions, respectively, may be helpful.

Very briefly the legislative development as to prescribing *rates* has been:

The Hepburn Act of 1906 contained in section 1 (which laid down the "substantive law") the general prohibition of every unreasonable rate, and conferred upon the Commission the power, upon complaint, to prescribe, in place of rates found to be unreasonable, reasonable maximum rates for the future.

The Mann-Elkins Act of 1910, still prohibiting any unreasonable rate, conferred upon the Commission the power, upon its own initiative as well as upon

complaint, to prescribe reasonable maximum rates in place of rates found to be unreasonable.

The Transportation Act of 1920, developing for the first time the idea that the public, in addition to being interested in reasonable rates, was interested in adequate service, directed the Commission to take the initiative and prescribe for the carriers, as a whole or in groups, rates which would yield, as nearly as may be, a fair return upon the aggregate value of railway property.

We have shown that from the time of the Hepburn Act the Commission dealt in a comprehensive way with the rates of many different carriers, viewing conditions in the aggregate, instead of attempting to deal separately with each carrier.

Very briefly the legislative development as to prescribing *divisions* has been:

The Hepburn Act of 1906, contained in section 1 no provision as to joint rates. Section 15 authorized the Commission to establish through routes and maximum joint rates, and, upon failure of the carriers to agree upon the divisions of such rates, to prescribe the apportionment or division thereof. An ambiguity in the language gave basis for doubt whether the Commission might not also have authority, upon disagreement among the carriers, to establish divisions of through rates which had been established by the carriers and not by the Commission.

The Mann-Elkins Act of 1910 declared in section 1 that it should be the duty of carriers to establish through routes and reasonable rates applicable thereto

and to make reasonable rules and regulations providing for reasonable compensation to those entitled thereto. Section 15 authorized the Commission to establish through routes and reasonable maximum joint rates, and continued in effect the provision of the Hepburn Act as to the power of the Commission to prescribe divisions upon the failure of the carriers to agree. It retained the ambiguity as to whether the Commission might, in respect of joint rates established by the carriers and not by the Commission, prescribe the divisions when the carriers disagreed. In 1916 the Commission decided it had no authority to prescribe divisions of joint rates except when it had prescribed the joint rates. In 1918 it decided that it did have such authority. *Morgantown and Kingwood Divisions*, 49 I. C. C. 540. It still remained true, however, that the Commission had no power over divisions except when the carriers disagreed.

Section 15 (6) of the Transportation Act of 1920, was a composite of the provisions of the House Bill and of the Senate Bill. The first sentence was, substantially, in the House Bill, and both sentences were, substantially, in the Senate Bill.

The purpose of each House was to broaden and strengthen the powers of the Commission.

The report on the House Bill (H. R. 10453), from the Committee on Interstate and Foreign Commerce, emphasized the purpose to give the Commission the initiative in establishing joint rates and through routes and the division of the rates as this "would still

further aid the shorter or weaker lines" (p. 10 of Committee Report of Nov. 10, 1919).

The last sentence of section 15 (6), which in substance was in the Senate Bill, but not in the House Bill, was designed, as is apparent on its face, to emphasize more than had been the case before that mere mileage was not to be the controlling factor in fixing divisions, but that the public interest, and the broader consideration of conditions bearing on the maintenance of an adequate transportation service throughout the country, should also be considered.

Thus the purpose of both the House and the Senate provisions was to liberalize the method of dealing with divisions, promote the pubic interest, and facilitate the protection of the shorter or weaker railroads—a matter manifestly connected with the general purpose of the Transportation Act to promote an adequate transportation service in all parts of the country.

The history of the legislation affords no basis for appellants' contention that the policy of Congress as to divisions was the "direct antithesis" of its policy as to rates.

The provision of section 15a as to rates and the provision of section 15 (6) as to division, both have the new note of affirmative promotion of the public interest.

In the *Wisconsin case* (*supra*), the court pointed out that section 13 (4) authorizing the Commission to remove an undue prejudice against interstate commerce, growing out of intrastate rates, must be

construed in the light of the other provisions of the act, saying especially:

> It is impossible to escape the dovetail relation between that provision and the purpose of section 15 (a).

There is also a "dovetail" relation between section 15 (6) and section 15 (a), and this relationship is particularly important in a case like this.

Congress, when seeking above everything to promote the public interest by an affirmative policy, should not be presumed to have been moving in two opposite directions: To exclude any power of the Commission to deal comprehensively with divisions of joint rates (a matter which might be, and in the present case is, of vital public importance), while at the same time directing the Commission to deal comprehensively with the rates themselves, and also empowering it to deal comprehensively with all State action which might tend to impair the due performance of public service.

9. Appellants' Contention That All Elements Defined in Section 15 (6) Were Considered Prior to Transportation Act.

Appellants devote considerable space to an effort to show that prior to the Transportation Act the Commission, in dealing with divisions, gave consideration to all the elements set forth in section 15 (6) and that therefore section 15 (6) involved no marked change in the law and indicated no new policy on the part of Congress but that it merely put in statutory form the interpretations placed upon the provision.

The fact of controlling importance, however, is that the Transportation Act adopted for the first time the affirmative policy of promoting the public interest by various steps to make it practicable to maintain an adequate railway service throughout the country. The introduction into the law of this new conception gave the public for the first time a real and direct interest in the matter of divisions.

Under the old law, and when the only purpose of the law was to see that rates were not too high or unjustly discriminatory, the interest of the public in the divisions of joint rates was almost, if not entirely, negligible.

In considering this point it is important to bear in mind that the numerous "*Tap Line cases*" and similar cases did not arise necessarily under the provision as to divisions, but arose under sections 2 and 3 of the Act to Regulate Commerce, because they involved questions of unjust discrimination or undue preference and in these, of course, the public was vitally interested. But the burden of these cases was the giving of an excessive division to a railroad which was owned by or closely affiliated with some industry which thereby got an advantage to the detriment of other shippers. The only case cited by appellants in which they claim the Commission held that the public had an interest in divisions is *Manufacturers Railway Co.* v. *St. Louis, etc., R. Co.*, 21 I. C. C. Reports, 304, 313. That case was a *Tap Line case* and the reference to the public interest clearly had relation to the provisions of the law against unjust discrimination.

On the contrary there were frequent expressions by the Commission, under the law prior to the Transportation Act, that divisions were not a matter of public interest. We call attention to the following:

> Divisions are matters of private agreement, and for that reason, generally speaking, are of no special concern to shippers, nor are they essential to legalize a published through rate. *Germain Co.* v. *N. O. & N. E. R. R. Co.*, 17 I. C. C. 22, 24.
>
> Division of rate is not matter of public concern and ordinarily should not be made standard of reasonableness of rate or measure of discrimination. *Board of Trade of Chicago* v. *A. C. L. R. R. Co.*, 20 I. C. C. 504 (508).
>
> It has often been said by the Commission that the law has no concern with division of rates which carriers make by agreement with each other; but this principle has very decided limitations. If a railroad is a shipper, or is owned by a shipper, or is so linked up with a shipper that a division of rate means a rebate or a discrimination in favor of or an advantage to the shipper, the Commission may properly look into the nature of the service which the carrier gives and the division which it receives. *In re Divisions of Joint Rates on Coal*, 22 I. C. C. 51 (53).
>
> If carriers freely and voluntarily agree as to divisions of rates, the question whether the apportionment made is fair and reasonable is of no special interest to the public and the Commission will not on its own initiative review the agreement. *Morgantown & Kingwood Divisions*, 49 I. C. C. 540, 550.

Undoubtedly these observations were appropriate when the only purpose of the law was to see that the total rates were not too high or were not unjustly discriminatory. But the basis of interfering in the matter of divisions was fundamentally changed by the adoption of the new and affirmative policy of the Transportation Act.

It was by reason of this fact that section 15 (6) emphasizes the matter of the public interest and that the Commission was given the power to deal with divisions even though the carriers did not disagree.

Appellants also insist that mileage was not the only factor considered by the Commission in dealing with divisions prior to the Transportation Act. We do not claim that it was the only factor considered. But section 15 (6) shows on its face a striking solicitude to see that other relevant factors having a vital bearing on the public interest should be adequately considered, and this is the purpose of the last sentence in section 15 (6).

10. The Commission's Power to Make Comprehensive Changes in Intrastate Rates.

It would seem that a sovereign State's protection against action by the Commission would be at least as important as the protection of the "individual" right of the carrier upon which the appellants lay such stress.

Section 13, clauses (3) and (4), as enacted by the Transportation Act provide that whenever in any investigation there shall be brought in issue "any rate, fare, charge," etc., proposed by State authority,

the Commission shall cause the State or States interested to be notified and that whenever in any such investigation the Commission, after full hearing, finds that "any such rate, fare, charge," etc., causes any undue, unreasonable or unjust discrimination against interstate or foreign commerce, the Commission shall prescribe the rate, fare or charge thereafter to be charged in such manner as in its judgment will remove such discrimination, and that such rates, fares and charges shall be observed, the law of the State or the order of the State authority to the contrary notwithstanding.

There is no express provision in these clauses that the Commission may proceed comprehensively in a single proceeding against all the intrastate rates on all the railroads in a given State. The provisions speak of the correction of "any rate, fare or charge," established by the State, which may constitute an unjust discrimination against interstate commerce.

As a matter of fact the Commission, in order to protect the public interest in transportation, has found it necessary to proceed in the most comprehensive manner and by blanket order to require the change of every intrastate rate at variance with what the Commission may in general terms decide is reasonable, in order to avoid discrimination against interstate commerce, the Commission, however, leaving open the door for correction of injustice.

If there is no reason for restricting, in favor of the State, the application of these provisions to narrow individual treatment of the respective intrastate

rates, certainly there can be no reason for restricting, in favor of these appellants, the provisions of section 15 (6) to a narrow individual treatment of separate joint rates and the divisions thereof.

If a State in New England maintains intrastate rates which in the view of the Commission tend unreasonably to impair the public service of the New England railroads, the Commission is authorized to act broadly and effectively. But the position of appellants is that if a carrier west of the Hudson continues to insist upon a division which by reason of the changed conditions tends unreasonably to impair the public service of the New England railroads, the Commission has no power to deal with that matter in a comprehensive and effective way, and can not relieve the situation until a detailed and separate investigation is made of each of the countless through routes and of each subdivision of each of the joint rates.

We submit that the observations of this Court in the *Wisconsin case* (*supra*), upholding the Commission's power to proceed comprehensively against the States is equally applicable to upholding the Commission's power to proceed in a corresponding way against carriers, the door being left open to the correction of injustice.

An examination of the reports will show that the States argued strongly against there being any power in the Commission to deal in such a comprehensive and sweeping way with intrastate rates, while these very appellants argued in favor of such

power, which was upheld by the courts, with the result that the appellants as well as other carriers are enjoying the increased rates on intrastate business, which have come about solely by reason of this sweeping action by the Commission against intrastate rates.

11. Claim That Comprehensive Treatment is Contrary to Precedent.

Appellants claim that this is the first case in which the Commission has dealt with divisions in such a comprehensive manner and that therefore the case is without precedent.

It is not surprising that this is the first case of this character that has arisen. It grew out of peculiar and unprecedented facts, heavy increase in operating costs during and since the War, bearing with disproportionate hardship on New England carriers. It is an exercise of power conferred by statute which was not passed until 1920.

Prior to the Transportation Act the law did not impose upon the Commission any duty to promote an adequate transportation system, and therefore the division of rates was a matter largely, if not wholly, of private concern. Not unnaturally a case of this character did not arise under the old law. Nevertheless when the Commission reduced the rate on pig iron from furnaces in the Southeast to points north of the Ohio River, it found it necessary to deal with the primary divisions at the Ohio River, and dealt with the matter as between the

group of carriers south of the Ohio River and the group of carriers north of the Ohio River. (*Sloss Sheffield case, supra.*) It is true its right to do so was acquiesced in, and apparently by common consent, but it is nevertheless an illustration of natural and proper comprehensive action.

V. APPELLANTS' CLAIM THAT THE ORDER IS NOT SUPPORTED BY EVIDENCE.

Analysis will show that all the arguments which the appellants use in trying to prove that the order is without evidence to support it grow out of the erroneous constructions of the statute for which they contend.

Appellants lay stress upon the proposition that the record contains no evidence as to the divisions accruing to a considerable number of railroads (almost without exception relatively unimportant railroads), and also contains no separate evidence as to the conditions of a few railroads. These criticisms of the order flow directly from appellants' primary assumption that the statute requires the Commission to investigate separately the divisions and subdivisions on each through route and the conditions of each carrier participating in such through route, and the proportion of the joint service thereon rendered by it, before any action at all can be taken as to divisions.

If appellants are correct that the statute must be so construed, then of course it is true that neither this record nor any other record within the bounds of practicable administration of the statute would enable the Commission to deal with the great prob-

lem of division of through rates between New England and other parts of the country.

The brief for the intervening New England carriers will treat fully the proposition that the evidence before the Commission was not only sufficient but ample to support the Commission's conclusion that the divisions east of the Hudson were unreasonably low and the divisions west of the Hudson were unreasonably high. We shall not therefore burden the court with a restatement of the evidence. We do, however, call attention to our statement of the case which attempts to give in very condensed form an outline of the various sorts of evidence before the Commission. We there pointed out how extensive was the evidence covering divisions and carriers in general. Further than that we pointed out the very great elaboration of the evidence with respect to the Trunk Lines which reach the Hudson River and which of themselves cover practically all of Trunk Line and C. F. A. Territories as is shown by the map appended to this brief.

If we are correct in our construction of Section 15 (6) to the effect that the Commission may deal with these problems in a practical way, and to that end may exercise discretion as to the acceptance of typical evidence, no one can question the overwhelming sufficiency of the record.

In the *Wisconsin case* (*supra*), the Court said:

> The report and findings of the Commission undoubtedly show that the intrastate fares work an undue discrimination against travelers in interstate commerce and against localities

(*Houston, E. & W. T. R. Co.* v. *United States*, 234 U. S. 342; 58 L. ed. 1341; 34 Sup. Ct. Rep. 833) in typical instances numerous enough to justify a general finding against a large class of fares. In a general order thus supported, possible injustice can be avoided by a saving clause allowing anyone to except himself from the order by proper showing. This practice is fully sustained by precedent in what was done as a sequence of the *Shreveport case* (*Houston, E. & W. T. R. Co.* v. *United States, supra*), sec. 34, Inters. Com. Rep. 472; 41 Inters. Com. Rep. 83; *Eastern Texas R. Co.* v. *Railroad Commission*, P. U. R. 1917 F, 554; 242 Fed. 300; *Looney* v. *Eastern Texas R. Co.*, 247 U. S. 214; 62 L. Ed. 1084; 38 Sup. Ct. Rep. 460. In *Illinois C. R. Co.* v. *Public Utilities Commission*, 245 U. S. 483, 508; 62 L. ed. 425, 437; P. U. R. 1918 C, 1279; 38 Sup. Ct. Rep. 170, this court indicated its approval of such practice, which was adopted by the commission. *Business Men's League* v. *Atchison, T. & S. F. R. Co.*, 49 Inters. Com. Rep. 713. Any rule which would require specific proof of discrimination as to each fare or rate and its effect would completely block the remedial purpose of the statute.

The doctrine thus laid down fully covers the Commission's procedure in the present case. It was justified by the evidence, in the exercise of its discretion, in concluding that the elaborate testimony before it was typical and an adequate basis for general finding that the main divisions east of the Hudson River were unreasonably low on the through

traffic and that the main divisions west of the Hudson were unreasonably high. Any rule requiring specific proof in the manner insisted upon by appellants "would completely block the remedial purpose of the statute."

In *O'Keefe* v. *U. S.*, 240 U. S. 294, involving divisions between the Louisiana & Pacific Railway, a tap line, and the various trunk lines connecting with it, it was claimed that there was no evidence before the Commission to sustain its finding. The court indicated that the commission had before it testimony as to the Louisiana & Pacific Railway's organization, ownership, manner and cost of construction, operating revenue and expenses, accumulated surplus, etc., and added:

> But, besides these details as to this line, the Commission had before it, as its reports show, *a mass of evidence relating to numerous other tap lines, operated under somewhat similar circumstances, including evidence as to the allowances actually made to them out of the joint rate. Evidence of what was allowed on these tap lines had a tendency to show what was reasonable and therefore permissible upon other tap lines, including the Louisiana & Pacific.* It is said there was no evidence to enable the Commission to fix a just compensation to that line for a haul of a given number of miles as compared with the just compensation for a haul of a greater or lesser number of miles; no evidence as to terminal expenses, or cost of road haul, or the relation between these factors, or as to other elements

> which should be taken into account in fixing a division according to the length of haul. But the evidence showed that some limitation was called for, and, in general at least, furnished the materials upon which to base it. *A tribunal such as the Interstate Commerce Commission, expert in matters of rate regulation, may be presumed to be able to draw inferences that are not obvious to others.*

It is true that in the *Wisconsin case* (*supra*) the Court also said:

> Nothing in the precedents cited justifies an order affecting all rates of a general description when it is clear that this would include many rates not within the proper class or the reason of the order. In such a case the saving clause by which exceptions are permitted can not give the order validity.

The context of the Court's opinion in that case shows, however, that the Court was considering whether the Commission's order could be sustained simply on the basis of the power existing prior to the Transportation Act to condemn intrastate rates which discriminated against persons and localities interested in interstate traffic. The Court pointed out that in this aspect the evidence before the Commission related only to such discrimination engendered by the intrastate rates to or near the border, and that such rates could not be regarded as typical of rates which were completely in the interior of the State. The Court therefore held that these interior intrastate rates were not within the reason of

the order's condemnation of intrastate rates discriminating against persons and localities interested in interstate commerce. The question was one whether the evidence relating to one type or class of rates could be regarded as typical with respect to a different type or class of rates which was outside the reason of the order. In the present case it has not been and can not be shown that the elements of evidence not in the record constitute a class which is outside of the reason of the Commission's order.

Prior to the Transportation Act and when there was no statutory requirement that the Commission should deal with carriers in groups in passing upon the reasonableness of through rates, the Commission for 16 years had proceeded, as we have pointed out before, to deal with the carriers comprehensively upon evidence which was regarded as typical. Evidence fully as enlightening, comprehensive, and specific was before the Commission in this case. If such evidence was sufficiently typical prior to the Transportation Act as to the reasonableness of the compensation which the public had to pay and which the carriers had the right to receive, it is equally typical now as to the reasonableness of the compensation which the carriers east and west of the Hudson, respectively, should receive out of the total joint rates which the public is required to pay.

Appellants, while conceding that the jurisdiction of the Commission to fix rates is the same as its jurisdiction in respect of divisions, seek to differentiate

in procedure on the ground that all interstate rates are required by the Interstate Commerce Act to be published and filed with the Commission, and that hence it is unnecessary that rates under attack should appear specifically in the record, but they claim this is not true as to divisions because they are not required to be published or filed. This difference is immaterial. It is clear under the decisions of this Court and the rules of the Commission that no evidence, even though in the Commission's archives, can be considered in a proceeding unless referred to in the record therein. Both as to rates and as to divisions the Commission necessarily has the power to proceed upon typical evidence, and that evidence must be in the record.

Appellants seek to establish their claim of insufficient evidence by making a great many quotations from the first report of the Commission in this case. Since this case, however, arises upon the order of the Commission, which makes only the second report of the Commission a part of the order, and since appellants themselves point out on page 4 of their brief that the second report completely reversed the Commission's previous decision, it is difficult to understand the function of these numerous references to the Commission's first report. Moreover, it will appear upon analysis that the various expressions of the first report with respect to the evidence either proceeded upon a different theory of the meaning of Section 15 (6) from that finally adopted by the

Commission or amounted to drawing different inferences as to the conclusions which the Commission ought to apply. It is well settled that this court will not undertake to revise the Commission's conclusions with reference to the facts and that it is immaterial that in a former report different conclusions may have been expressed.

In *Manufacturers Ry. Co.* v. *U. S.*, 246 U. S. 457, the court said (p. 482):

> It may be conceded that the evidence would have warranted a different finding; indeed the first report of the Commission was to the contrary; but to annul the Commission's order on this ground would be to substitute the judgment of a court for the judgment of the Commission upon a matter purely administrative, and this can not be done.

Not only was there evidence to support the Commission's order in this case, but the changed conditions during and since the war, coupled with the other considerations pointed out in our statement of the case, and the competitive and other interrelationships between the through rates and the divisions thereof, make it clear that the Commission's action was eminently wise and sound and was the most appropriate action to correct a new and serious element of unreasonableness in the divisions of the through rates; and if such action had not been taken the result would have been that for an indefinite period the appellants would have continued to enjoy the benefits of divisions unreasonably high.

Appellants' Objection That the Divisions Were Illogical and Hence the Record Could Not Be Basis for Comprehensive Action.

Appellants refer more than once to the fact that the divisions of through rates between New England and other parts of the country do not constitute a logical structure, but display many inconsistencies. Apparently appellants seek to deduce from this condition the conclusion that the record can not constitute a basis for comprehensive action.

If any such principle should apply, there would be little the Commission could do, because little if any of the structures of rates or divisions can be regarded as logical, and practically all of these rates and divisions grew up, as did the railroads themselves, "without system." The whole problem is one of gradual growth in which a vast number of variegated factors have played a part. The result is naturally far from perfect. If it be declared to be a principle of law that the Commission must not begin the comprehensive correction of injustices until it has a perfect structure to start with, the Commission will be unable to function.

The history of rates in C. F. A. territory furnishes an interesting analogy. In The Five Per Cent case, *supra*, it appeared that the existing rate structure in C. F. A. territory was illogical, and unjustifiable, and yet the Commission did not hesitate to grant a 5 per cent increase in rates, of which the carriers were glad to avail themselves despite the lack of perfection in the structure on which the increase

was based. Moreover, it was recognized that the structure ought to be materially improved and the work of improvement was carried forward (as was provided here), and subsequently a new and improved rate structure was adopted. But the fact that the original increase was made in contemplation of improvements in the system did not in any way impair the Commission's authority to act. It was not regarded as an unwarranted provisional transfer of money from the public to the carriers, pending a decision as to the reasonableness of the rates, but was regarded as a practical way of giving relief in a situation which called for relief.

The practical result of appellants' position on this point, illustrating anew their misconstruction of the statute, is that despite a finding by the Commission, the expert tribunal created by Congress to deal with such problems, that the divisions of the complainants were unreasonably low, and divisions of appellants were unreasonably high, nevertheless appellants shall be permitted to continue indefinitely to enjoy these unreasonably high divisions until all specific instances which may turn out to be exceptions may be dealt with. In other words, they claim that general and important relief from an unreasonable and illegal condition shall be postponed until special and exceptional cases can be dealt with. This is wholly opposed to the policy of the interstate commerce laws and to their administration, and can be justified solely by applying an unwarranted restricted interpretation to the Commission's powers as to divisions.

VI. CLAIM OF APPELLANTS THAT THE ORDER IS NOT A DECISION ON DIVISIONS BUT A TEMPORARY TRANSFER OF REVENUES "PENDENTE LITE."

On this point also the argument of appellants results from their erroneous idea that the Commission's powers as to divisions are peculiarly and rigidly restricted to a separate dealing with each division and subdivision of each joint rate. Starting with that premise they claim that since the Commission's order was not such a prescribing of divisions, therefore it must have been something else and something which the law did not permit.

It is well first to see what the Commission did. It found that the scales which had formerly hung approximately level as between the participating carriers had been tipped against New England roads and in favor of their western connections because of the changed conditions and it consequently found that the divisions accruing to the complainants had become unjust, unreasonable, and inequitable. It pointed out that in such case, when required by the public interest, the Commission could grant immediate relief subject to later readjustments, as it had done in cases involving general increases or reductions in rates. The Commission showed that in Increased Rates, 1920, it had pointed out that it would be desirable if possible to determine definitely the commodities, sections of the country, and even the individual rates which could best bear the burden of increases and that it was conceded by the carriers that readjustments would be necessary, and that the

rates to be established pursuant to its decision must necessarily be subject to such readjustments as the facts might warrant. The Commission also showed that in *Rates on Grain, Grain Products and Hay*, 64 I. C. C. 85, where percentage reductions on these commodities in the territory west of the Mississippi River were ordered, the Commission was not deterred from acting by the fact that such reductions might, and probably would, leave certain individual rates unreasonably low and others unreasonably high, saying "in all such general rate cases we have realized and have held that if we were required to consider the justness and reasonableness of each individual rate, the law would in effect be nullified and the Commission reduced to a state of administrative paralysis." (Record, p. 117.) The Commission also mentioned that in cases involving intrastate rates, following the general increase in 1920, it had been customary to supplement the general findings by the reservation that the State or any other party in interest might apply for a modification as to specific intrastate rates on the ground that they did not violate the interstate commerce act. In other words, the Commission, in rate cases, had recognized that its general action might, in specific instances, result in the increase or reduction of either interstate rates or intrastate rates which ought not to be so increased or reduced, and yet this had not precluded practical action to correct in a comprehensive way the unreasonableness which the Commission had found to exist.

Thus what the Commission did was to decide that the divisions were unreasonable and prescribe their correction, subject to subsequent readjustments. In other words, to use the language of this court in the Wisconsin case, *supra*, with reference to rates:

> "In a general order thus supported, possible injustice can be avoided by a saving clause allowing any one to except himself from the order by proper showing."

The position of appellants, however, is that the Commission can do no such thing in a divisions case, since that would disregard what appellants conceive to be the "individual right" of each carrier to have a hearing as to each separate division or subdivision; and this notwithstanding the fact that, as held by this court in the Wisconsin case, *supra*, the Commission clearly can do this in the matter of the total rate not only as against the individual right of the carrier, but as against the individual right of a sovereign State and against the individual right of every shipper or passenger in the country.

Appellants, however, quote from the Wisconsin case that a saving clause will not give validity to an order affecting all rates of a general description when it is clear that this would include many rates not within the proper class or the reason of the order. But, as that case shows, the court was considering the question whether the evidence before the Commission to the effect that intrastate rates worked an undue prejudice upon persons and localities engaged in interstate commerce was of such a character as to

be typical of intrastate rates which did not reach border points, and the court held that this was not the case, since the evidence as to such undue prejudice related only to intrastate rates reaching border points. The court's observations therefore related merely to the question as to whether a certain aspect of an order had typical evidence to support it, and this is a matter we have dealt with under the preceding heading.

Appellants stress the fact that since it appeared that certain divisions might be left too high and others too low by the Commission's order, the order was necessarily void. But in the general rate cases, the result of the orders has been that numerous specific rates, in some cases interstate and in other cases intrastate, might be rendered either too high or too low by the order, and yet this has not prevented the Commission from dealing with the problem in a practical way subject to appropriate readjustments afterwards.

The burden of appellants' contention therefore is that the Commission could not make a general order as to divisions subject to subsequent readjustments, and hence the Commission's order must be construed as a transfer of revenues pending the further conduct of the proceeding, and must be held void as beyond the Commission's authority. So the appellants get back to their misconstruction of section 15 (6).

Appellants also base their position upon views expressed in the Commission's first report in this case, and also upon views expressed in an opinion of one

of the Commissioners dissenting from the second report. Here again the appellants are endeavoring to get this court to decide the case upon questions within the province of the Commission. See *Manufacturers' Railway Co.* v. *U. S.* (*supra*).

The extensive quotation made by appellants on page 34 of their brief, from the dissenting opinion referred to, strongly illustrates the soundness of the Commission's conclusion. Numerous specific divisions are there referred to which on their face may appear to be inconsistent or unfair. Bearing in mind the myriad of divisions to be considered, it is apparent that if correction of the general outstanding unreasonableness had been postponed until all such separate cases could be disposed of, the result would have been a substantial denial of relief, as was clearly indicated in the Commission's report. It does not follow, because some specific divisions appear on their face to be inconsistent or unreasonable, that the scores of thousands of divisions in the case should, for practical purposes, be segregated and each separately dealt with. It is well to recall the emphatic statement of Witness Robert C. Wright, chairman of the trunk lines traffic committee in this case, that "the divisional arrangement must be taken as a whole"; that "he wants to make it clear that in considering the question of rate divisions, you can not take individual instances. No individual instance is typical. It must be taken as a whole." (Record, pp. 507, 508.)

It is important also to remember that the Commission reached its conclusions on the basis of factors of general operation; the disproportionate manner in which the extraordinary increases in operating costs had affected the New England lines by reason of their peculiar characteristics; the general character of the large rate increase, only recently made, and which had operated uniformly to make a relative increase in divisions as well as in rates, regardless of any exceptional characteristics of special divisions; and the interrelated character of the divisions themselves, on account of competitive and other factors, making it highly important to preserve in general, existing relationships between divisions via different gateways and routes, and subject only to subsequent readjustment upon a showing of necessity therefor. Thus the very strongest practical reasons appealed to the Commission's discretion to deal with the matter in the manner it adopted.

Since the Commission had the power to deal comprehensively with the situation, and had an ample record upon which to act, its action was not invalidated because it contemplated such further readjustments as might be appropriate in order to correct instances of injustice which might thereafter appear.

VII. THE CLAIM OF APPELLANTS THAT THE ORDER IS VOID BECAUSE MERELY AN EFFORT TO RELIEVE FINANCIAL NEEDS.

Here also appellants' contention grows out of a theory that the divisions clause does not authorize the order and hence it must have been made for some unauthorized purpose.

Appellants, however, correctly say that the most convincing evidence of the authority which the Commission claimed was the authority which it exercised. It is desirable to recall the authority which was exercised.

The Commission examined the operating conditions and burdens east and west of the Hudson in the aspects of the terminal work, the length of hauls, the diffusion of traffic over light lines, the light loading of trains, the density of traffic, the high investment per revenue ton mile, the entire absence of coal mines in New England and the consequently higher cost of fuel; the extraordinary increase in expenses during and since the war, the resulting disproportionate increase of unit costs in New England; the fact that the long standing divisions were presumptively reasonable prior to these changed conditions; and reached the conclusion that the scales which formerly hung approximately level had now been tipped against the New England roads in favor of their western connections. The Commission examined the railway operating income of the complainants as compared with other carriers and found that the relative situation of the New England carriers had grown progressively worse and that as a group they were in greater financial need than any other group of important carriers in the country. (Record, pp. 113–116). The Commission found that the amount of this disproportionate burden upon the New England lines was such that in order to be reasonable the divisions of the New England carriers ought to be increased 15 per cent.

In passing we wish to emphasize that the Commission was not "working backwards" as charged by appellants in arriving at its conclusions. On the basis of the elements mentioned in section 15 (6) and especially on account of the disproportionate operating burdens on the New England lines, the Commission concluded that the divisions of the complainants were unreasonably low (Record, pp. 113–115), and it found that this disproportionate burden was well over $7,500,000 per year (Record, p. 119). It also found, manifestly as a confirmatory consideration, that, in view of the disproportionate burdens which had operated to make the existing divisions for the complainants unreasonably low, it would have been proper for complainants to receive one-half instead of one-third of the increase in the revenues from joint rates and that this amount would have been about $7,500,000 per year. This was a logical and straightforward way of arriving at the concrete conclusion that to avoid the unreasonableness in the divisions they ought to be increased by 15 per cent.

It would be difficult to imagine a course of action more appropriately considering the elements which section 15 (6) provides should be regarded "among others."

Yet the substantial action thus taken by the Commission is sought to be overturned by appellants through the means of lengthy arguments designed to show that the Commission was influenced to too great an extent by the financial needs of the New England carriers.

Appellants quote observations in the Commission's report with reference to the relative financial needs of the carriers, to the consideration of the inequalities of conditions east and west of the Hudson, and to the necessity for the maintenance of the financial integrity and credit of the carriers. These observations, whatever they were, could not affect the substantial action which the Commission took, as above pointed out. But in reality these observations were no more than natural references to the very elements which were mentioned in section 15 (6). All of those elements would, of course, be matters appropriate to consider in the fixing of rates. If any carrier or group of carriers were seeking to secure an increase in rates, every one of the considerations mentioned by the Commission would be relevant to such a proceeding. It is well known that carriers in attempting to show that rates are unreasonable comment upon their financial needs, upon special conditions which make their right to increased compensation exceptionally plain, upon the necessity for maintaining their financial integrity and credit, and upon the public interest that this shall be done. If all these matters are natural and proper considerations in ascertaining what compensation is reasonable for a carrier or group of carriers in respect of traffic local to their respective lines, certainly the same things are natural and proper elements to be considered in reaching a conclusion as to the reasonableness of compensation received by carriers for traffic which they deliver to or receive from connecting lines.

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Almost without exception it has been true from the beginning of railroad regulation that a carrier seeking increased rates has stressed, as a matter of course, the fact that it "needed the money," because of its bearing upon the question as to what was reasonable compensation. This is doubtless the first case where laying stress upon the need for the money is assigned as a reason why relief should not be given.

It is also urged by appellants that the Commission considered these factors only with reference to the New England lines and not with reference to the lines west of the Hudson. But the report shows that the Commission's conclusions were based upon a comparison of the conditions east and west of the Hudson and that the consideration of the conditions west of the Hudson was an inextricable part of the Commission's action.

Appellants seem finally, however, to plant their argument upon the proposition that the Commission gave "all the weight" to the one factor of the revenue requirements specified in the statute, whereas it should have given "due weight to all the factors enumerated in the statute," and that 'failure to do so constitutes an error of law." This reduces the argument to the contention that the court itself should weigh the evidence and reach a conclusion as to whether or not the Commission had given undue weight to one element rather than to another. Any such procedure would at once convert the court into an appellate tribunal, whereas it is well settled that the court will not enter upon any such inquiries and

will refuse to set aside an order which has evidence to sustain it. *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57. It is manifest from the record that the Commission weighed all the elements mentioned in the statute.

Appellants, in their effort to turn the case into something different from what it was, refer also to the action of the Commission in two other cases, the Missouri & North Arkansas case and the Kansas City, Mexico & Orient case. Those cases depend on their own facts, and neither the Commission's orders therein nor the Commission's expressions therein can be adequately appraised except by a study of those records. If and when those cases come to this court, it will appear that neither the action of the Commission nor the significance of its observations is correctly indicated by the appellants' comments thereon. However, we need not stop to argue the point that the validity of the present order depends on what the Commission did and on the record on which it did it and can not depend on what was done in other cases.

Appellants' argument on this general proposition in its final analysis resolves itself again into the question of statutory construction and to insistence upon the proposition that the Commission is restricted to a separate consideration of the divisions and subdivisions of each separate through rate and to the weighing of the relative parts of the service performed by each link in the particular through route—a matter which we have already discussed at length.

VIII. SECTION 15 (6) IS NOT UNCONSTITUTIONAL.

It is further urged that section 15 (6) is unconstitutional if it can be construed as authorizing the Commission to make this order. So construed the section merely authorizes the Commission to determine what are just and reasonable divisions of through rates. Of course, the result of the statute may be that the compensation which a carrier receives for transporting through traffic may be diminished by the findings and order of the Commission, based upon evidence, that the compensation received at the time by the carrier is unreasonably high. Ever since 1906 section 15 of the act to regulate commerce has authorized the Commission to reduce the compensation received by carriers for the transportation of passengers and property when the Commission, upon evidence, should find that the compensation received at the time by the carrier is unreasonably high. It is also true that the Commission ever since 1906 has acted under section 15 in the most comprehensive manner, arriving at conclusions of unreasonableness, and making orders reducing rates, upon the basis of evidence either general, special or typical, as might appeal to the Commission's discretion. There has never been any serious suggestion that section 15 so construed and applied is unconstitutional. Certainly its effects upon the carrier, in the matter of the carriers' property rights, are identical in nature with the effects upon the carriers in the reduction of divisions. For example, a reduction in divisions would have no

different effect on the carrier from that of a reduction in rates growing out of a general proceeding such as that in *Grain, Grain Products and Hay*, 64 I. C. C. 85.

It has never been supposed that any element of unconstitutionality arises from the fact that the Commission deals with these problems broadly, and in the light of a large mass of evidence put in by parties on both sides, and which the Commission regards as typical.

As to the theory that the act is unconstitutional because it is alleged to involve a transfer of money which is the property of one carrier to another carrier not in consideration of any service rendered, the facts are at variance with the theory. The money in question is a joint fund for the performance of a joint service. The statute requires it to be divided so that the divisions shall be just, reasonable, and equitable. The Congress intrusts the decision of this question to a competent expert tribunal and of course contemplates that that tribunal shall have before it evidence upon which to base its decision. A statute with provisions of this character certainly can not be regarded as depriving any carrier of its property without due process of law.

A distinct additional reason in support of the constitutionality of the statute, as well as in support of the validity of the action of the Commission, grows out of the fact that the provisions of the statute relative to divisions is a part of the same statute which has provided an affirmative and con-

structive method of producing rates sufficient, in time of normal business, to maintain adequately the transportation interest of the country. The carriers hailed this statute as a great protective measure to sustain their interests, as well as the interests of the public. In pursuance of this statute, and acting only upon general and typical evidence, an increase averaging in fact about 37 per cent was made upon this joint traffic and upon all other traffic within eastern territory, and an increase of 33 per cent upon joint traffic between New England and the West and the South.

The statute required that the divisions of the joint rates as thus increased should be just, reasonable, and equitable. It seems inconceivable that it would be unconstitutional, as a part of the same statutory plan, to authorize the Commission, in arriving at a division of the resulting joint fund, to act with the same breadth of procedure that it employed in making the increase in revenue. As a matter of fact, the Commission, in deciding upon the divisions, had a record much more specific in character than it had when it granted the increase in rates.

CONCLUSION.

Appellants try to make out of the Commission's action in this case a departure from the statute and point to this alleged departure as revolutionary and alarming.

The case can not be successfully clothed in any such guise. The Commission upon ample evidence

found the divisions of the complainants to be unreasonably low. The order conformed to the natural meaning of the statute and this is the only construction of the statute that harmonizes with the general policy of the law. The statute gives the carriers all the protection and all the advantage as to compensation received by them on joint traffic that they have or could ask for as to rates in general.

It is well to emphasize that nonaction or indefinite delay by the Commission in remedying unjust divisions is itself an injustice. The Commission, the expert body created by Congress, has concluded that the divisions of the New England lines are unreasonably low and should be corrected. If it is prevented by an unnecessary, restrictive, and exceptional interpretation of this provision of the law from making substantial correction until the lapse of one or two or three years which may be taken up in the specific examination of all the separate divisions and subdivisions, the public interest and the just interests of the carriers will for the time being be defeated. It is more in the public interest, and more in promotion of the protection of property rights, to give the New England lines prompt relief from divisions which the Commission has found to be unreasonable, than it is to permit the lines west of the Hudson River to continue to enjoy for an indefinite period divisions which the Commission has found to be unreasonably high. In such premises prolonged ineffectiveness of the remedial machinery of the law would be as unjust as

the unreasonable divisions which Congress has prohibited. Such a result can not be in accordance with the legislative intent.

Walker D. Hines

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Solicitors for the Interstate Commerce Commission.

P. J. Farrell

P. J. FARRELL,

Of Counsel.

WASHINGTON, D. C., *January, 1923.*

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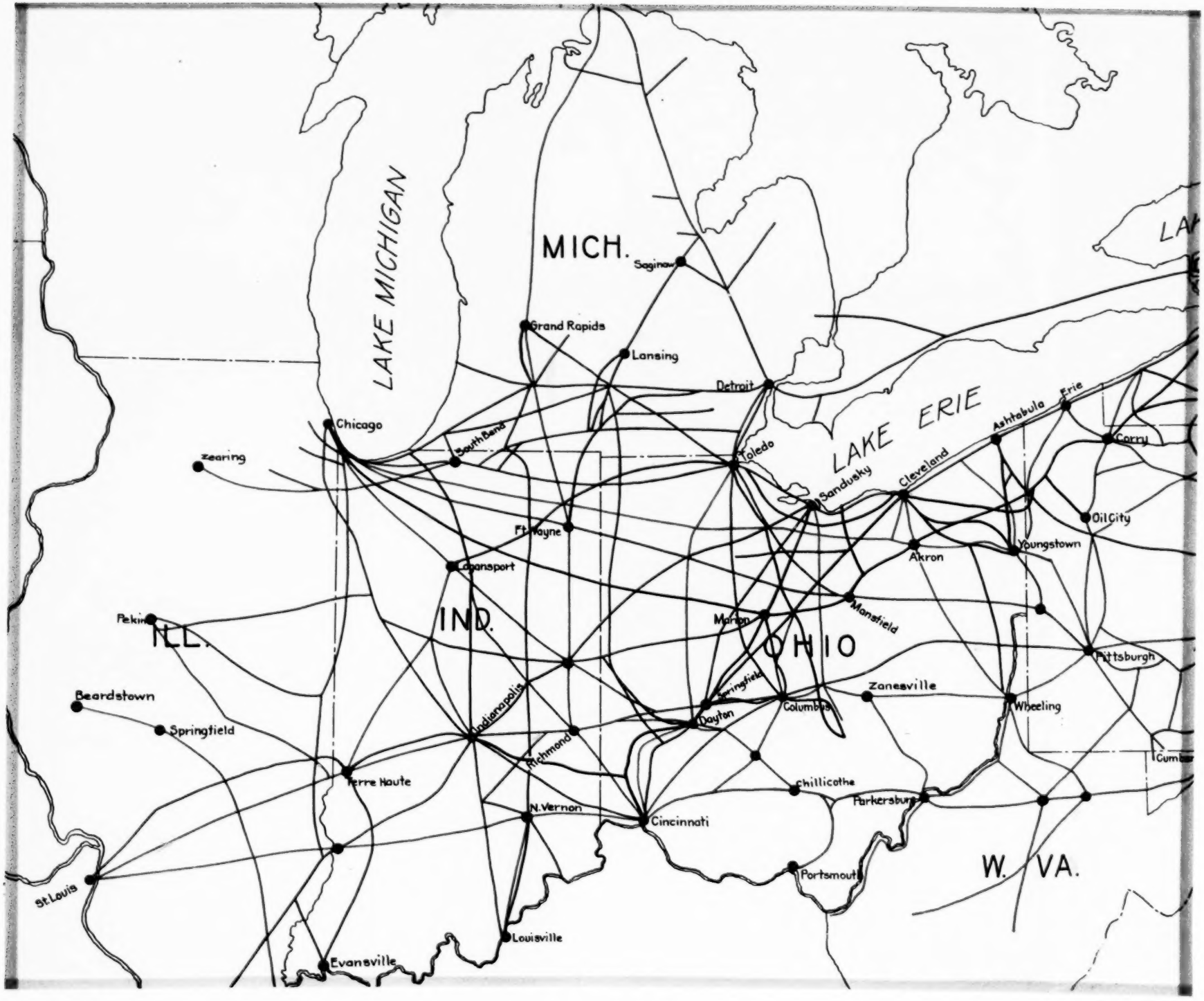
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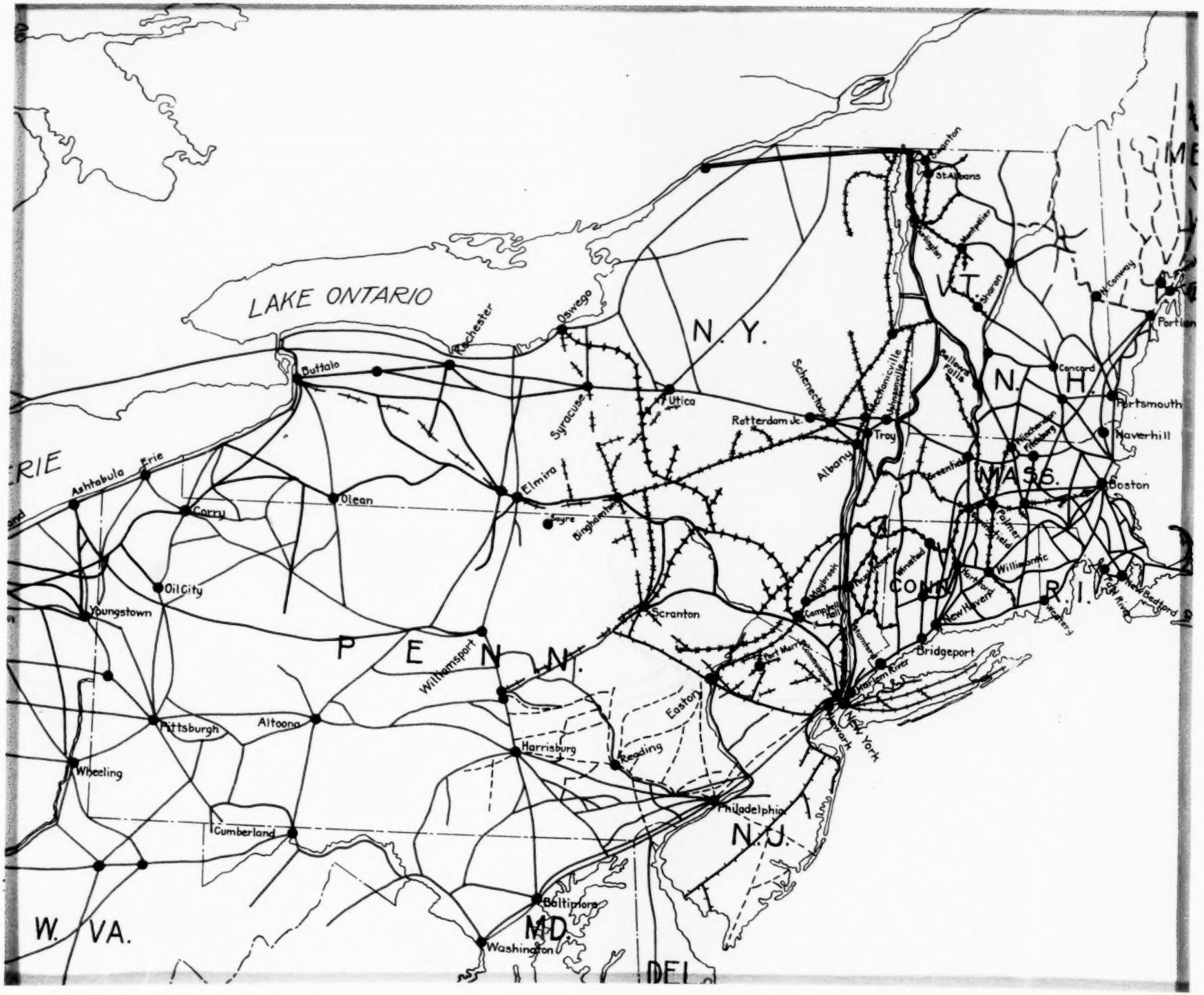
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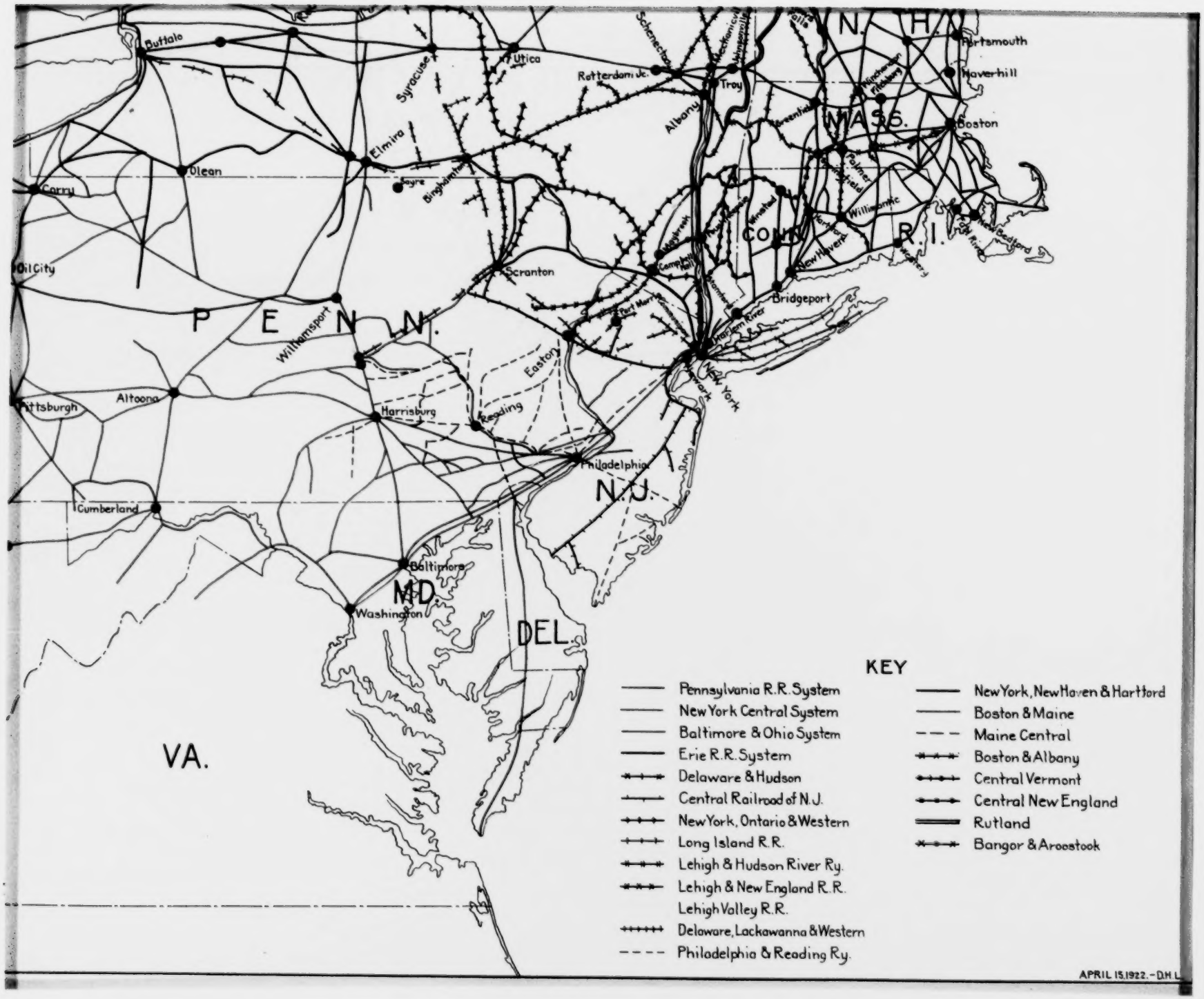
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Lehigh & New England R.R.
Lehigh Valley R.R.
Delaware, Lackawanna & Western
Philadelphia & Reading Ry.
New York, New Haven & Hartford
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Maine Central
Boston & Albany
Central Vermont
Central New England
Rutland
Bangor & Aroostook
APRIL 15, 1922. - D.H.L.